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No. 91-——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DEKALB BOARD OF REALTORS, INC., and
METROPOLITAN MULTI-LIST, INC.,
Petitioners,

v.

FLETCHER L. THOMPSON and
EMPIRE REAL ESTATE BOARD, INC.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether a Board of Realtors® violates Section 1 of the Sherman Act, 15 U.S.C. § 1, by requiring licensed brokers to join the Board and subscribe to the Realtor® Code of Ethics as a condition of participation in its wholly owned multiple listing service, when Board membership is available to all licensed brokers on reasonable and non-discriminatory terms and adherence to the Code promotes the efficient operation of the multiple listing service.

PARTIES

The parties to the proceeding below were: DeKalb Board of Realtors®, Inc.;* Metropolitan Multi-List, Inc., d/b/a Metro Listing Service; Fletcher L. Thompson, d/b/a Fletcher L. Thompson Realty; and Empire Real Estate Board, Inc. Petitioner Metropolitan Multi-List, Inc., is a wholly owned subsidiary of petitioner DeKalb Board of Realtors, Inc. Petitioners have no parent company and no subsidiaries (other than wholly owned subsidiaries).

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* The terms "Realtor"® and "Realtors"® are federally registered collective membership marks owned by the National Association of Realtors®.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 934 F.2d 1566, and is included in the Appendix at pp. 1a-30a. The order of the court of appeals denying rehearing is included in the Appendix at pp. 44a-46a. The opinion of the district court granting petitioners' motion for summary judgment is included in the Appendix at pp. 31a-43a.

JURISDICTION

The opinion and judgment of the court of appeals were entered on July 11, 1991. A timely petition for rehearing was denied on September 10, 1991. On November 30, 1991, Justice Kennedy granted an application for an extension of time within which to file this petition to and including January 8, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Sherman Act, 15 U.S.C. § 1, provides in pertinent part that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

STATEMENT OF THE CASE

1. Petitioner DeKalb Board of Realtors, Inc., is a membership association of persons engaged in the real estate business in DeKalb County, Georgia. DeKalb County is located within the Atlanta metropolitan area, adjacent to the city of Atlanta. Like more than 1800 local boards and associations of Realtors across the country, the DeKalb Board of Realtors is a member board of the National Association of Realtors ("NAR") and of its State Association of Realtors.

Membership in the DeKalb Board of Realtors is open to any licensed real estate broker whose principal place of business is within the geographic area served by the DeKalb Board.[1] The basic requirements for Realtor mem-

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[1] The city of Atlanta is served by the Atlanta Board of Realtors. Like the DeKalb Board, the Atlanta Board is a member board of the NAR, but it is not a party to this suit. Realtor membership in the Atlanta Board also is open to all licensed brokers upon application and payment of annual dues, currently $275. Prior to April 1989,

bership are submission of an application and application fee ($20), payment of annual dues ($174.50 per year per licensee), and agreement to subscribe to the Code of Ethics of the NAR.[2]

Petitioner Metropolitan Multi-List, Inc. ("Metro"), is a real estate multiple listing service ("MLS") and a wholly owned subsidiary of the DeKalb Board of Realtors. Metro's participants submit information to Metro about residential properties that are exclusively listed with the participant's firm. They also offer to compensate any other Metro participant who produces a qualified buyer for the property. Metro then makes the residential listing available to all other MLS participants via computer terminals or books published on a biweekly basis. Access to Metro is one of the benefits of membership in either the DeKalb or the Atlanta Board of Realtors. It is available to all members upon payment of a deposit and supplemental MLS fees and charges.[3]

Metro's multiple listing service is similar to that offered by a majority of all local boards of Realtors throughout the United States. The popularity and effectiveness of the multilist approach among both consumers and brokers is reflected in its rapid growth. The first

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the annual membership dues for the Atlanta Board were $363 for a Realtor and $198 for each licensee affiliated with a Realtor member; the Atlanta Board also charged a one-time initiation fee of $500 per member. Defendants' Statement of Uncontested Material Facts ¶¶ 24, 25 ("Statement of Facts"). All references to the Statement of Facts are to paragraphs either admitted as true or not contested in "Plaintiffs' Response to Defendants' Statement of Uncontested Material Facts."

[2] Statement of Facts ¶ 28, Ebert Aff. ¶ 7.

[3] Participants in Metro pay a one-time initiation fee of $1,000 that is nonrefundable, a $500 deposit that is refunded upon withdrawal from the service, monthly dues of $225, and user publishing fees of $2 per listing and $14 biweekly for listing books. Statement of Facts ¶ 31; Ebert Aff. ¶ 8.

multiple listing service was developed in 1907. By 1926, a majority of local boards of Realtors operated a multilist.[4]

As the court of appeals recognized, "multilist services have many pro-competitive effects." Pet. App. 23a. Chief among these is the elimination of "imperfections in the marketplace by increasing the availability of information." *Id.* Specifically, a multiple listing service reduces a buyer's search costs by enabling buyers to gather relevant information about available properties and current price levels from a single MLS-participant's office. Sellers achieve quicker sales because their property is available to be marketed by all participants in the MLS, not merely by the agents of the listing firm. Finally, the MLS makes it easier for newcomers to enter the real estate brokerage business by enabling them to sell the listings of other MLS participants until they can secure a listing inventory of their own.[5]

The court of appeals also recognized that the adoption and enforcement of the Realtor Code of Ethics, and in particular Articles 14 and 21 of the Code, are "reasonable and narrowly tailored" to "the goal of inducing brokers to join the multilist system." *Id.* at 27a. This constitutes a "legitimate procompetitive justification" for requiring adherence to the Code. *Id.* Article 21, for example, prohibits a Realtor from soliciting a listing from the seller/client of another Realtor while an exclusive listing is in effect. This restriction responds to the legitimate concerns of listing brokers that the proprietary information they submit to an MLS about their clients

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[4] FTC Staff Reports, *The Residential Real Estate Brokerage Industry* 86-87 (1983) (hereinafter "FTC Report"); Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 Colum. L. Rev. 1325, 1328-29 & n.30 (1970) (hereinafter "Austin").

[5] *See, e.g.*, FTC Report at 31-32 (explaining "the need for pooled listings"); Austin, 70 Colum. L. Rev. at 1328-29 (1970).

and their clients' property be used only for cooperative purposes and not to solicit the client. *Id.* at 26a.

Article 14 requires Realtors to arbitrate, rather than litigate, business disputes with other Realtors. *Id.* at 27a. Given the extensive interaction among brokers fostered by the MLS, disputes between brokers inevitably arise. The arbitration requirement and the arbitration services provided to Realtors by the local board assure participants that a speedy and inexpensive means is available to them to resolve such disputes.[6] In this way, Article 14 also serves the procompetitive purpose of "inducing brokers to join the multilist system." *Id.*

In sum, the purpose of a multiple listing service is to foster constructive cooperation among brokers.[7] To persuade potential members to join, a multilist service must meet their concerns about the integrity of the service and the need to minimize and resolve disputes. To meet these concerns, the DeKalb Board, like most boards of Realtors, requires participants in its Metro MLS to be members of their local board of Realtors. This requirement assures potential members that all participants will adhere to a uniform set of professional standards and will agree to arbitrate disputes.

2. At the time the complaint was filed, respondent Fletcher L. Thompson was a licensed real estate broker operating his own brokerage firm, Fletcher L. Thompson Realty, in Atlanta. Prior to 1987, Thompson was affiliated with another brokerage firm and was an asso-

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[6] Perhaps the most typical dispute is one over which broker was responsible for procuring a transaction. The amount of money at stake is usually less than $10,000. If members were not required to arbitrate, participants would be forced either to resort to expensive litigation or simply to abandon their claims.

[7] *See* FTC Report at 87 ("A fundamental function of the local Boards has been to bring about . . . 'cooperation' " among brokers).

ciate member of the Atlanta Board of Realtors. Since starting his own practice, he has not applied for membership in the Atlanta Board of Realtors, which serves the area in which his principal place of business is located. He did, however, request access to Metro. Statement of Facts ¶¶ 4, 6; Pet. App. 3a, 32a.

His request was denied with a letter explaining that he needed to join the Atlanta Board of Realtors before he could participate in Metro. It is not disputed that, at the time this lawsuit was filed, Thompson met the qualifications for membership in the Atlanta Board and expected that his application, if submitted, would be accepted. Statement of Facts ¶ 69.

Thompson is a member of respondent Empire Real Estate Board, Inc. ("Empire"). Empire, a predominantly African-American association of licensed real estate agents serving the Atlanta area, was founded in 1939. Empire does not provide its members with a multiple listing service. Empire's annual dues range from $75.00 to $175.00. Statement of Facts ¶ 5; Pet. App. 20a.

3. On December 22, 1988, Thompson and Empire filed this action against petitioners, alleging four antitrust claims (under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2), and three civil rights claims (under the Fair Housing Act, 42 U.S.C. §§ 3604, 3606). Specifically, respondents alleged that petitioners' requirement that real estate agents join their local board of Realtors as a condition of participating in Metro constituted both an illegal tying arrangement (Count 1) and a group boycott (Count 3) in violation of Section 1. Respondents further alleged that the plaintiffs had unlawfully denied respondents access to an "essential facility" (Count 2) and had conspired to create a monopoly (Count 4) in violation of Section 2. Finally, respondents argued that petitioners' membership requirements discriminated against African-American real estate brokers in violation of the Fair Housing Act (Counts 5, 6, 7). Pet. App. 33a-42a.

The district court granted summary judgment for petitioners on all counts.[8] With respect to the boycott and tying claims, the district court held that respondents had failed to introduce sufficient evidence to show that petitioners had market power in a relevant market for participation in multiple listing services. The district court noted that another multiple listing service, First Multiple Listing Service ("FMLS"), also served the same geographic market as Metro and that FMLS did not require its members to join their local board of Realtors. The district court found that the existence of FMLS demonstrated that petitioners lacked market power both because FMLS provided a competitive alternative to Metro and because it "proves that the services can be successfully duplicated and offered on competitive terms." *Id.* at 35a.

Respondents appealed only the antitrust claims. The court of appeals affirmed the judgment on the Section 2 claims. It reinstated, however, both the boycott and the tying claims.

The court of appeals agreed with the district court that, "[a]s a result of the pro-competitive effects inherent in multilist services," the boycott claim must be analyzed under the rule of reason. *Id.* at 23a. But the court reversed the district court's holding that petitioners lack market power. Defining market power not in terms of

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[8] With respect to the Section 2 claims, the district court found both the lack of evidence of market power and the lack of evidence of a specific intent to monopolize each independently dispositive. Pet. App. 41a-42a. With respect to the Fair Housing Act claims, the district court found that respondents had failed to introduce any evidence that petitioners had discriminated against any applicants on the basis of race at any time relevant to this case or that membership terms for African-Americans were different than for others. It held that memories of past discrimination were insufficient today to support such claims. *Id.* at 42a-43a. Indeed, "[at] all times relevant to this lawsuit, the Atlanta Board [of Realtors] has accepted every application for Realtor membership submitted to it." Statement of Facts ¶ 19.

Metro's ability to raise its prices above competitive levels but as "'whether the multilist service has 'sufficient economic importance that exclusion results in the denial of the opportunity to compete effectively on equal terms,'" the court of appeals concluded that "[m]arket power turns on the number of brokers who use the service, the total dollar amount of annual listings, and a comparison of the rate of sales using the multilisting service to the market as a whole." *Id.* at 24a (quoting *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1373 (5th Cir. 1980)).

The court of appeals then instructed the district court that if, under this analysis, it found that petitioners had market power, "it *must find* that the Realtor membership requirements are an illegal group boycott." *Id.* at 28a (emphasis added). The standard for evaluating petitioners' membership requirement was not whether the terms on which membership was offered were reasonable. Rather, the court of appeals held that the dispositive question was whether the requirement of membership was "'reasonably necessary to the accomplishment of . . . legitimate goals and *narrowly tailored* to that end.'" *Id.* at 27a (quoting *Realty Multi-List*, 629 F.2d at 1375) (emphasis added).

Finding this to be "a pure question of law" that was "properly before this Court" (*id.* at 25a), the court of appeals held that "[i]t is clear that the Realtor membership requirements are not narrowly tailored to the goal of inducing brokers to join the multilist system." *Id.* at 27a. According to the court of appeals, "Metro could easily impose its own 'no solicitation' and arbitration rules on its members. Such rules would not constitute a group boycott and would achieve the same ends that Metro claims the Realtor membership requirements achieve." *Id.* at 27a-28a. The court concluded that the board membership requirement must be invalidated upon

a finding of market power as defined by the court. *Id.* at 28a.

As to the tying allegation, the court of appeals held that the board membership requirement was sufficient to support a claim of a *per se* unlawful tie-in under Section 1. Petitioners had argued, *inter alia*, that, because a multilist service cannot exist apart from the rules and regulations that govern its operation, the membership requirement was not a separate product but simply the decision of the DeKalb Board and Metro about the rules and regulations that would govern Metro participants. *Id.* at 13a. The court of appeals disagreed. It relied on evidence in the record supporting the theory that there is a "market for professional affiliation" that "is separate from the market for multilist services." *Id.* at 14a.

The court of appeals also reversed the district court's finding that Metro lacked market power in the market for the tying product (multilist services). Even though respondents conceded "that the physical assets of a multilist service can easily be purchased at costs comparable to those initially paid by Metro," *id.* at 18a, the court of appeals held that petitioners had "built an insurmountable amount of good will" that could, without more, be sufficient to establish market power as a matter of law. *Id.*

Finally, the court of appeals summarized affidavits from individuals who, for various reasons (cost, past history of discrimination, personal preference) would prefer not to join a board of Realtors but still to have access to Metro. The court held that such evidence raised a jury question whether the membership requirement had the effect of "forcing" brokers to purchase a "product" (board membership) that they did not want. *Id.*

REASONS FOR GRANTING THE PETITION

The decision below conflicts with this Court's decisions in *Associated Press* v. *United States*, 326 U.S. 1 (1945), and *Anderson* v. *United States*, 171 U.S. 604 (1898). It also squarely conflicts with numerous decisions of federal and state courts throughout the country which, relying on *Associated Press* and *Anderson*, have rejected boycott and tying challenges to identical board membership requirements. Specifically, the decision conflicts with *Pope* v. *Mississippi Real Estate Comm'n*, 872 F.2d 127, 130-31 (5th Cir. 1989), where the Fifth Circuit held as a matter of law that requiring board membership as a precondition to gaining access to a multilist service does not violate the Sherman Act as long as board membership requirements are reasonable. Four district courts and two state supreme courts also have held that conditioning access to a multilist upon reasonable board membership requirements does not violate the antitrust laws. *E.g.*, *O'Riordan* v. *Long Island Bd. of Realtors, Inc.*, 707 F. Supp. 111 (E.D.N.Y. 1989); *State* v. *Cedar Rapids Bd. of Realtors*, 300 N.W.2d 127 (Iowa 1981). In each of these cases, application of the Eleventh Circuit's "narrowly tailored" standard—a standard several circuits have rejected in rule-of-reason cases—would have led to a different result.

The decision also conflicts with the position taken by the United States Department of Justice in numerous cases and consent decrees involving local boards and multiple listing services. Although the Department of Justice has challenged MLS membership requirements that were unreasonable, see, *e.g.*, *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980), it has never required boards to abandon board membership, per se, as a condition for participation in a competitively significant MLS. See *infra* p. 17 & n.13.

As for the Eleventh Circuit's analysis of the tying claim, it conflicts with the reasoning of the First Circuit in *Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988), which upheld a directed verdict against a plaintiff who alleged that the board membership requirement constituted a tying arrangement. Furthermore, the Eleventh Circuit's holding that "good will" can constitute an entry barrier sufficient to establish the market power element of a tying claim conflicts with decisions of the Second and Ninth Circuits rejecting the argument that good will is an entry barrier. *United States* v. *Waste Management, Inc.*, 743 F.2d 976, 984 (2d Cir. 1984); *United States* v. *Syufy Enters.*, 903 F.2d 659, 669 (9th Cir. 1990). And at bottom, the court of appeals' holding that a membership requirement can constitute a *per se* illegal tie-in conflicts with the logic of this Court's decision in *Associated Press* and its progeny that conditioning the availability of services on reasonable membership terms does not violate Section 1.

The decision below also is of national significance. Boards and Associations of Realtors in 49 states require membership in a board as a precondition for participation in board- or association-owned multiple listing services.[9] Under the Eleventh Circuit's decision, most of these boards or associations are potentially engaged in a group boycott as a matter of law and are vulnerable to liability under a *per se* tying theory because most operate a multilist service that has a substantial number of participants and has engendered good will. If allowed to stand, the decision will, in all likelihood, prompt local boards across the country to undertake the expensive task of restructuring their multiple listing services to avoid the antitrust risks posed by the decision. And associations generally will be exposed to antitrust liability whenever

[9] California is the one exception. *See infra* note 12.

they confine valuable association benefits and services to those who elect to join the association, even if association membership is available to all competitors on reasonable and non-discriminatory terms.

Only a decision of this Court can resolve the conflicts among the lower courts and provide definitive guidance to state courts whose antitrust laws are patterned after the Sherman Act. This Court should grant the petition in order to resolve these conflicts and to provide boards of Realtors, multiple listing services, and associations generally with guidance on the fundamental antitrust question whether they may limit valuable services to members as long as their membership requirements are reasonable and nondiscriminatory.

1. The decision below conflicts with this Court's decisions in *Associated Press* v. *United States*, 326 U.S. 1 (1945), and *Anderson* v. *United States*, 171 U.S. 604 (1898). These decisions establish the bedrock principle that an association need not provide services to nonmembers if the association's membership criteria are reasonable and nondiscriminatory.

At issue in *Associated Press* were bylaws that placed significant "obstacles to . . . membership" in the path of any applicant whose newspaper competed with an existing member (326 U.S. at 9-11), and that blocked "nonmembers from any opportunity to buy news from AP or any of its publisher members." *Id.* at 9. A three-judge district court, in an opinion by Judge Learned Hand, held that the obstacles to gaining membership in AP were unreasonably exclusionary and therefore violated the Sherman Act. The court refused, however, independently to strike down those bylaws that prohibited non-members from obtaining news from AP. *United States* v. *Associated Press*, 52 F. Supp. 362, 373-74 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945). Judge Hand explained that the bylaws requiring news organizations to be mem-

bers of AP in order to receive AP news, "taken by themselves, and apart from the restrictions upon membership . . . would be valid." *Id.* at 374. The court therefore enjoined the restrictions on membership only until AP adopted a reasonable and nondiscriminatory membership policy. *Id.*

The government expressly appealed this aspect of the ruling. 326 U.S. at 21-23. This Court, however, affirmed the district court's "refusal to hold each of these [bylaws] a violation of the Sherman Act standing alone," and thus affirmed AP's right to impose reasonable membership requirements as a condition of receiving AP news. *Id.* See also *Anderson*, 171 U.S. at 608-10, 612-14, 618-19 (association of livestock traders whose bylaws prohibited members from trading with non-members and required adherence to ethical rules, but whose membership rules were such that "[e]very one can become a member," did not violate Section 1).

Associated Press has guided the decisions of the Fifth Circuit in *Pope* v. *Mississippi Real Estate Comm'n*, 872 F.2d 127 (5th Cir. 1989), of four federal district courts, and of two State Supreme Courts interpreting state statutes patterned after the Sherman Act. Each of these courts has rejected boycott challenges to a board-membership requirement comparable to the requirement challenged here. The decision below squarely conflicts with each of these decisions.

The plaintiffs in *Pope* were a husband and wife who owned the largest brokerage firm in Monroe County, Mississippi. They resigned their membership in their local board of Realtors in 1981 when their board changed its fee structure to a proportional system that greatly increased their dues. Three years later, after the board had merged with a multiple listing service, the Popes sought and were refused access to that service solely because they did not belong to the board. They sued the

board, alleging that the board membership requirement and fee structure violated Section 1 of the Sherman Act. 872 F.2d at 131.

The district court held that "the real issue presented in the case *sub judice* is not whether the membership requirements are discriminatory . . . but whether simply requiring membership to participate in the MLS violates the 'rule of reason.'" *Pope* v. *Mississippi Real Estate Comm'n*, 695 F. Supp. 253, 271 (N.D. Miss. 1988). After an extensive review of the case law, the district court held that the membership requirement was not unlawful and granted summary judgment for the defendants. *Id.* at 269-72. The court of appeals affirmed. Referring to the earlier Fifth Circuit decision in *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980), the court observed that reasonable membership requirements are not unlawful because, "[i]f properly administered, membership requirements serve pro-competitive purposes." 872 F.2d at 130. Accordingly, "the clear reasonableness of the fee apportionment employed by the board" was dispositive of the Pope's boycott challenge. *Id.* at 130-31.

Had the complaint been filed in Mississippi, Louisiana, or Texas, this case would be at an end because the Fifth Circuit's standards would require dismissal at the summary judgment stage of litigation.[10] Because the complaint was filed in Georgia, however, petitioners now must

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[10] Although the Eleventh Circuit below, like the Fifth Circuit in *Pope*, relied on *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980), *Pope* makes clear that the Eleventh Circuit's reading of *Realty Multi-List* is erroneous. *See Pope* 872 F.2d at 130 (*Realty Multi-List* condemns only unreasonable membership requirements); *see also Pope*, 695 F. Supp. at 271; *O'Riordan* v. *Long Island Bd. of Realtors, Inc.*, 707 F. Supp. 111, 115 (E.D.N.Y. 1989); *compare Realty Multi-List*, 629 F.2d at 1377-78.

proceed to trial. Thus, not only does the legal principle underlying the Eleventh Circuit's holding have significant practical implications that make immediate review appropriate (see *infra* pp. 24-25), but the disparate treatment of similarly situated litigants makes review of the decision below particularly compelling.

No purpose would be served by allowing the issue to percolate further. Lower courts in a variety of states have addressed the antitrust legality of board-membership requirements for participating in multiple listing services. Thus, the issue has been fully ventilated. Moreover, the rule of decision in *Pope* is identical to the rule employed by numerous federal and state courts addressing antitrust challenges to membership requirements for multiple listing services.

For example, in *O'Riordan* v. *Long Island Bd. of Realtors, Inc.*, 707 F. Supp. 111 (E.D.N.Y. 1989), the plaintiff, like respondent Thompson, was a former member of his local board of Realtors who later sued the board when it refused to grant him access to its multiple listing service. The court granted summary judgment to defendants on all of plaintiff's claims, including the claim that "requiring [board] membership as a prerequisite to MLS membership" constituted an "illegal boycott." *Id.* at 115-16. The court's reasoning was identical to that in *Pope*: "Since there is nothing in the record from which a jury could infer that the requirement of [board] membership is unreasonable, plaintiff's claims of illegal boycott and concerted refusal to deal must fail." *Id.* at 116. See also *Brown* v. *Indianapolis Bd. of Realtors*, 1977-1 Trade Cases ¶ 61,435 at 71,613-614 (S.D. Ind. 1977) ("A voluntary business or membership organization may lawfully adopt reasonable standards of membership, and having done so it may thereafter restrict the incidents and advantages and benefits of membership to its members"); *Martin-Trigona* v. *National Ass'n of Realtors*, 1978-1

Trade Cases ¶ 61,915 (E.D. Ill. 1978) (summarily dismissing boycott claim on authority of *Associated Press* and *Brown*); *Murphy* v. *Alpha Realty, Inc.*, 1978-2 Trade Cases ¶ 62,388 at 76,315 (N.D. Ill. 1978) (dismissing boycott claim on basis of *Associated Press*, *Brown*, and *Martin-Trigona*).

The Eleventh Circuit's rule also conflicts with the holdings of two state supreme courts, both of which relied on federal law under the Sherman Act in construing its state antitrust law.[11] In *State* v. *Cedar Rapids Bd. of Realtors*, 300 N.W.2d 127, 128-31 (Iowa 1981), the Supreme Court of Iowa—relying expressly on *Associated Press* and on *Anderson*—held that "[s]o long as Board membership is available to all on a nondiscriminatory basis as this record indicates, we will not compel this private trade association to share one of its membership benefits with brokers who, for whatever personal or business reasons, declined to join." *Id.* at 131.

In *Pomanowski* v. *Monmouth County Bd. of Realtors*, 446 A.2d 83, 87-92 (N.J.), *cert. denied*, 459 U.S. 908 (1982), the New Jersey Supreme Court followed the reasoning in *Cedar Rapids* in rejecting a similar boycott challenge; the court concluded that, even though the defendants had market power, "it is difficult to see any affront to competition" in the absence of any "exclusionary conditions" or "prohibitively high" membership costs. 446 A.2d at 89, 92. Among other state courts, most of which have relied on *Associated Press*, only California has reached a result comparable to the one below.[12]

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[11] These decisions have served in turn as the basis for subsequent federal court decisions. *See, e.g., Pope*, 695 F. Supp. at 270 (finding *Cedar Rapids* "very persuasive"); *O'Riordan*, 707 F. Supp. at 116.

[12] In *Marin County Bd. of Realtors, Inc.* v. *Palsson*, 549 P.2d 833 (Cal. 1976), the California Supreme Court, construing the state's Cartwright Act, appeared to hold that denying non-Board members access to the multilist service was unlawful "in conjunction with" other restrictive rules. *See id.* at 844 n.13. The

The *Associated Press* principle also informed the enforcement policy of the Antitrust Division of the United States Department of Justice when, in the 1970s, the Department pursued a nationwide investigation of the membership rules and practices of real estate boards. The Department's enforcement activities effectively terminated several practices, such as the use of subjective criteria for membership, that had the potential to exclude unfairly otherwise qualified brokers from membership. See, *e.g.*, *Realty Multi-List, Inc.*, 629 F.2d at 1377-87. But the Justice Department has never required that boards make their multiple listing service available to nonmembers. On the contrary, it has required only that, consistent with *Associated Press*, board membership be available to all licensed brokers on reasonable, non-discriminatory terms.[13]

California appellate courts have construed *Palsson* broadly, however, to require that boards make multilist services available to nonmembers. *See, e.g., People* v. *National Ass'n of Realtors*, 174 Cal. Rptr. 728 (Cal. Ct. App. 1981); *Glendale Bd. of Realtors* v. *Hounsell*, 139 Cal. Rptr. 830 (Cal. Ct. App. 1977).

Other state courts have not gone so far. In *Collins* v. *Main Line Bd. of Realtors*, 304 A.2d 493 (Pa.), *cert. denied*, 414 U.S. 979 (1973) and in *Grillo* v. *Board of Realtors*, 219 A.2d 635 (N.J. Super. Ct. Ch. Div. 1966), the Supreme Court of Pennsylvania and a superior court of New Jersey enjoined application of membership requirements that were unreasonably exclusionary or discriminatory; neither court banned the use of reasonable requirements. The remaining state court decisions are consistent with *Cedar Rapids* and *Pomanowski*. *See Grempler* v. *Multiple Listing Bureau, Inc.*, 266 A.2d 1, 7 (Md. 1970); *Blake* v. *H-F Group Multiple Listing Serv.*, 345 N.E.2d 18 (Ill. App. Ct. 1976); *Barrows* v. *Grand Rapids Real Estate Bd.*, 214 N.W.2d 532 (Mich. Ct. App. 1974); *Oates* v. *Eastern Bergen County Multiple Listing Serv., Inc.*, 273 A.2d 795 (N.J. Super. Ct. Ch. Div. 1971).

[13] *See O'Riordan*, 707 F. Supp. at 113 (noting that U.S. Department of Justice had entered consent decree with defendant requiring that membership requirements be reasonable, and that defendant had submitted letters from DOJ confirming that current membership requirements were "considered by the Department to be reasonable and non-discriminatory").

These precedents demonstrate that the court of appeals' fundamental error was in failing to adopt the *Associated Press* test. Under that test, the dispositive question is whether the membership requirements for gaining access to a valuable service are reasonable and nondiscriminatory. If they are, then an antitrust challenge to them should be dismissed.

Here, by contrast, in holding that the membership requirement was not "narrowly tailored" to the legitimate goals it admittedly served (Pet. App. 27a), the court of appeals adopted an insuperable and inappropriate 'least restrictive means' standard. Such an approach is tantamount to *per se* condemnation of the membership requirement. It will always be possible for a court to say that an MLS can operate without a requirement of board membership.

The Eleventh Circuit's analysis is wrong as a matter of fact as well as antitrust law. As a factual matter, it is more efficient for an MLS to use the existing professional standards and arbitration facilities maintained by its parent board of Realtors than to create its own enforcement and arbitration system with the added costs such a redundant system would entail. As a legal matter, the Eleventh Circuit's "least restrictive alternative analysis," while "sometimes used in constitutional law," has no place under the rule of reason: "The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity." *National Football League* v. *North Am. Soccer League*, 459 U.S. 1074, 1079 (1982) (Rehnquist, J., dissenting from denial of cert.); see *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 229 n.11 (D.C. Cir. 1986) ("Once it is clear that restraints can only be intended to enhance efficiency rather than to restrict output, the degree of restraint is a matter of business rather than legal judgment"), *cert. denied*, 479 U.S. 1033 (1987); *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1248-49

(3d Cir. 1975) ("Application of the rigid 'no less restrictive alternative' test in cases such as this one would place an undue burden on the ordinary conduct of business"); *Bruce Drug, Inc.* v. *Hollister Inc.*, 688 F.2d 853, 860 (1st Cir. 1982) ("defendant was not required to adopt the least restrictive means of stopping [plaintiff] from selling abroad, but merely means reasonably suited to that purpose"); Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 8-9 (1984).

In sum, the decision below conflicts with *Associated Press*, *Anderson*, and *Pope*, with the decisions of four district courts and numerous state courts, and with those circuit courts that have rejected the "least restrictive means" standard in applying the rule of reason. This Court should grant certiorari to resolve these conflicts, and in particular to determine whether the Fifth Circuit or the Eleventh Circuit has properly applied the Sherman Act to the lawfulness of requiring board membership as a condition of participation in a multiple listing service.

2. The court of appeals' decision on the respondents' tying claim also conflicts with the decisions of other circuits. Specifically, the court's holding that separate products are involved conflicts with the reasoning of the First Circuit in *Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988), and with the decision of the district court in *O'Riordan*, that only a single product is involved. In addition, the court of appeals' holding that good will can constitute an entry barrier sufficient to establish market power squarely conflicts with holdings of the Second and Ninth Circuits. Finally, the court's tying decision conflicts with *Associated Press*, *Pope*, and the other cases just discussed: A restraint that is lawful under the rule of reason when challenged as a boycott ought not become unlawful if the restraint is alternatively labeled a tie-in.

a. The plaintiff in *Wells* refused to apply for membership in his local board because of "principled intransi-

gence." 850 F.2d at 806. He alleged "that the MLS constituted an illegal tying arrangement, wherein access to the listings (the tying product) was impermissibly conditioned on membership in the Board . . . (the tied 'product')." *Id.* The court of appeals affirmed the trial court's entry of a directed verdict on the ground that plaintiff had failed to show that "there was a 'market' at all for real estate board membership." *Id.* at 815 & n. 11.

In explaining its holding, the First Circuit endorsed petitioners' argument below that only one product is involved:

> We are also doubtful whether this situation constitutes a 'tie' of separate 'products' in the first place. . . . The defendant boards are not 'sellers' in the usual sense of the term, but rather a trade organization. The MLS is one of the advantages gained by joining that trade organization [a board of realtors]. . . . Membership brings with it certain responsibilities as well. Whether or not it is subject to challenge on other antitrust grounds, such an arrangement is not a matter of invalid tying.

Id.

The *Wells* analysis was expressly cited by a district court, in stark contrast to the holding below, as an alternative basis for granting summary judgment on a tying claim. *O'Riordan*, 707 F. Supp. at 116-17. The district court explained that tying analysis was inapplicable because "what [the board] and its wholly owned subsidiary, MLSLI, are offering is a single system of marketing real estate. It is a single product and does not fall within the tying analysis." *Id.* at 117. This is precisely the argument rejected by the court of appeals below. Pet. App. 12a-14a & n.6.[14]

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[14] At a minimum, this Court should hold this case pending the decision in *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, No. 90-1029, *cert. granted*, 111 S. Ct. 2823 (1991). In *Eastman Kodak*, the principal issue presented is whether the court of appeals

b. The Eleventh Circuit's tying analysis also conflicts with a second line of cases on the pivotal question of how market power is measured.[15] In this case, the district court found that Metro lacked market power because it had no cost advantage and there were no entry barriers into the market. The Eleventh Circuit reversed, holding that proof that Metro had engendered "good will" was sufficient as a matter of law to establish a barrier to entry.[16] Pet. App. 18a.

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erred in reversing a grant of summary judgment for a defendant equipment manufacturer alleged to have tied the sale of replacement parts to the sale of repair service for its equipment when the manufacturer concededly lacked market power in the market for equipment. Separately raised as the second question presented in the petition is the threshold question whether it is reasonable even to presume that the market for parts and service of equipment is separate from the market for that equipment. Resolution of these questions may well involve reexamination of the standards for identifying separate product markets and may therefore be dispositive of the conflict here.

[15] *See Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 13-18 (1984) (proof of market power in the tying product market is an essential element of any *per se* tying claim); *United States Steel Corp.* v. *Fortner Enters., Inc.*, 429 U.S. 610, 620 (1977) (plaintiff must prove that "seller has some advantage not shared by his competitors in the market for the tying product"); *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F.2d 792, 794-97 (1st Cir. 1988) (discussing "the significant 'market power' requirement of *Jefferson Parish*").

[16] Proof of barriers to entry is essential to a finding of market power because "without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 591 n.15 (1986); *see Will* v. *Comprehensive Accounting Corp.*, 776 F.2d 665, 672 n.3 (7th Cir. 1985) ("Unless barriers to entry prevent rivals from entering the market at the same cost of production, even a very large market share does not establish market power"), *cert. denied*, 475 U.S. 1129 (1986); *International Distrib. Ctrs., Inc.* v. *Walsh Trucking Co.*, 812 F.2d 786, 792 (2d Cir.) ("market share analysis, while essential, is not necessarily determinative" of market power, because factors such as "barriers to entry" must be considered), *cert. denied*, 482 U.S. 915 (1987); *Ball*

This holding squarely conflicts with decisions of two other courts of appeals. In *United States* v. *Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984), the defendant, like petitioners here, argued that a high market share (48.8 percent) was not indicative of market power because defendant had no cost advantage over potential entrants. The plaintiff, like respondents here, argued "that consumers may prefer [defendant's] services, even at a higher price, over those of a new entrant because of its 'proven track record.'" *Id.* at 984. The Second Circuit expressly rejected this argument: "We fail to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition." *Id.*

Similarly, in *United States* v. *Syufy Enters.*, 903 F.2d 659 (9th Cir. 1990), the Ninth Circuit quoted the Second Circuit's analysis in *Waste Management* with approval. The court explained that "an environment where businesses fight it out using the weapon of efficiency and consumer goodwill is what the antitrust laws are meant to champion." *Id.* at 669. The Second and Ninth Circuit decisions reflect the simple economic fact that Metro will quickly lose any good will it has accumulated if Metro engages in monopoly pricing, and it will then be vulnerable to competition from new entrants.[17]

Memorial Hosp., Inc. v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1335-37 (7th Cir. 1986) (because market power "is the ability to control output and prices," lack of entry barriers means "existing market share does not signify power").

[17] The district court's holding that petitioners lack market power—based on the lack of any cost advantage or entry barrier—therefore was clearly correct. *See Will*, 776 F.2d at 673 (tying claim must be rejected absent proof that defendant had "a cost advantage over rivals and potential rivals" or proof of "a barrier to entry"). This is true even without the presence of another competitor (FMLS) in the market. *See United States* v. *Syufy Enters.*, 903 F.2d 659, 668 (9th Cir. 1990) ("But when a producer deters competitors by supplying a better product at a lower price, when he

More broadly, the Eleventh Circuit's market power analysis is inconsistent with the fundamental principle that the antitrust laws exist to protect competition and not competitors. In effect, the court below held that plaintiffs may rely upon the very good will that a successful business engenders in order to force that business to change the way it provides its services. "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States* v. *Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (Hand, J.).

c. Finally, the Eleventh Circuit's conclusion that respondents' membership requirement is prima facie evidence of an unlawful tie-in conflicts with the principles that underlie the "boycott cases"—*Associated Press*, *Pope*, *O'Riordan*, *Cedar Rapids*, and the others—which hold that membership requirements are not unlawful under the rule of reason if membership is available on reasonable and equal terms. It makes no sense to say that a restraint which is lawful when challenged as a boycott under Section 1 suddenly becomes *per se* unlawful once it is labeled a "tying arrangement." In *Jefferson Parish*, this Court noted the fundamental point: "The legality of petitioners' conduct depends on its competitive consequences, not on whether it can be labeled 'tying.'" *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 21 n.34 (1984); see *Smith Machinery Co.* v. *Hesston Corp.*, 878 F.2d 1290, 1295 (10th Cir. 1989) (same), *cert. denied*, 493 U.S. 1073 (1990). Plainly, the United States would not have been entitled to enjoin AP from imposing reasonable membership requirements as a condition of receiving AP news if it had labeled its cause of action "tying" instead of "boycott."

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eschews monopoly profits, when he operates his business so as to meet consumer demand and increase consumer satisfaction, the goals of competition are served, even if no actual competitors see fit to enter the market at a particular time").

The Eleventh Circuit reached a different result in part because it failed to apply correctly the *per se* tying analysis. It erroneously concluded both that two products were involved and that Metro had market power. Here, a finding that membership requirements were reasonable and nondiscriminatory not only would satisfy the *Associated Press* test, but also would confirm that petitioners lacked market power to raise the price of the allegedly tied product (association membership) above competitive levels. See *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F.2d 792, 798 (1st Cir. 1988) (defendants' "ability to extract so small an amount of 'extra' money by itself shows very little [market] power").

But the Eleventh Circuit's analysis also points up a weakness of the *per se* analysis itself—it overlooks legitimate business justifications for the tying arrangement. For example, in *Gonzalez* v. *St. Margaret's House Housing Dev. Fund Corp.*, 880 F.2d 1514 (2d Cir. 1989), the business justifications for the challenged restraint were so compelling that the Second Circuit was "virtually certain that this arrangement would survive scrutiny" under the rule of reason. *Id.* at 1519. It nevertheless reversed the entry of summary judgment for defendant, because while the "facts of this case reveal the . . . weaknesses in the *per se* tying analysis . . . . a majority of the Supreme Court . . . has not abandoned the *per se* test." *Id.* This case thus presents this Court with an opportunity to determine the role that legitimate business justifications should play in a tying analysis, and to consider whether "[t]he time has therefore come to abandon the '*per se*' label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have." *Jefferson Parish*, 466 U.S. at 35 (O'Connor, J., joined by then-Chief Justice Burger, then-Justice Rehnquist, and Justice Powell concurring in the result).

3. The practical impact of the Eleventh Circuit's decision extends far beyond this case. The Eleventh Circuit

held, as a matter of law, that the membership requirement is unlawful whenever a multilist service has market power. Virtually all multilist services will have market power as the Eleventh Circuit has defined it, because in most communities there is only one multilist service and in most communities those services have engendered good will.

At a minimum, therefore, the decision below requires local boards throughout Georgia, Florida, and Alabama to abandon their board membership requirement for MLS participation and adopt separate standards of conduct for MLS participants and board members; it also may require them to develop separate mechanisms for enforcing those standards and for arbitrating disputes involving MLS participants and board members. Although these boards could apply the NAR Code of Ethics to all MLS participants whether or not they are board members, creating a separate enforcement and arbitration mechanism is a difficult and expensive task. Moreover, if allowed to stand, the Eleventh Circuit's decision will likely prompt challenges to comparable membership requirements in use throughout the country. Given the costs and uncertainties of defending antitrust litigation, many boards of Realtors may feel compelled to operate less efficient multilist services to avoid becoming enmeshed in such litigation, and these costs may deter smaller boards from offering multilist services at all.

Such an expense should not be imposed on the real estate industry absent any showing that the current way of doing business has any unreasonable exclusionary impact. It is particularly ironic—and inappropriate—that a single private lawsuit, coming a decade after intensive federal government scrutiny had reshaped membership rules nationwide and approved the use of reasonable board membership requirements, could effectively impose such fundamental and costly changes on so many organizations. The question whether the antitrust laws may properly be

used to condemn an association that offers membership to all competitors on reasonable and nondiscriminatory terms but confines its benefits and services to its members is therefore one of national importance that this Court should resolve.

CONCLUSION

The petition for a writ of certiorari should be granted.

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January 8, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 90-8724

FLETCHER L. THOMPSON d/b/a
FLETCHER L. THOMPSON REALTY;
EMPIRE REAL ESTATE BOARD, INC.,
Plaintiffs-Appellants,

v.

METROPOLITAN MULTI-LIST, INC., d/b/a
METRO LISTING SERVICE;
DEKALB BOARD OF REALTORS, INC.,
Defendants-Appellees,

WENDELL WHITE d/b/a EMPIRE REALTY CO. and
E. PEARL PRESLEY d/b/a PAL REALTY CO.,
Intervenors-Plaintiffs.

Appeal from the United States District Court
for the Northern District of Georgia

July 11, 1991

Before JOHNSON and COX, Circuit Judges, and GODBOLD, Senior Circuit Judge.

JOHNSON, Circuit Judge:

This case arises on appeal following the district court's grant of summary judgment in favor of the defendants in this antitrust action.

I. STATEMENT OF THE CASE

A. *Background Facts*

Metropolitan Multi-List, Inc. ("Metro"), one of the defendants-appellees, is a wholly-owned subsidiary of the DeKalb Board of Realtors. Metro is a computerized multilist real estate listing system. A multilist system is a cooperative venture which is used by real estate brokers from various real estate firms who place into the system a list of all the houses that they are attempting to sell. Brokers representing potential buyers look for houses through the multilist, and in the event of a sale they split the resulting commission with the selling broker. Brokers consider the use of a multilist system a necessity.

Metro provides the only multilist service which covers all of Atlanta. While First Multiple competes with Metro on the north side of Atlanta, there is little or no competition on the south side of Atlanta. On the south side of Atlanta, Metro carries the vast majority of listings and is utilized in most of the completed sales, measured both in dollar amounts and in raw numbers. Also, the vast majority of real estate brokers active in the area are members of Metro.

In order to use the Metro multilisting service a broker must become a Realtor. A Realtor is a broker (or a sales associate) who belongs to one of the local branches of the National Association of Realtors. Metro was an independent listing service until the DeKalb Board of Realtors acquired Metro and imposed the Realtor membership requirement upon those who would like to use the listing service.

There are four parties to this dispute. The two defendants are Metro and the DeKalb Board of Realtors; the two plaintiffs are Fletcher Thompson and the Empire Real Estate Board. Fletcher Thompson is a real estate broker who owns his own brokerage firm on the south side of Atlanta. He does not wish to join the Atlanta Board of Realtors.[1] He applied to use the Metro listing service but his application was denied solely because of his failure to join the Realtors. The defendants admit that when he joins the Realtors he will be allowed to use the listing service. The Empire Board was founded in 1939 as an African American professional association because, at that time, the Realtors excluded African Americans from membership. The Empire Board competes with the Board of Realtors and offers similar services, including a code of ethics and arbitration. The Empire Board is a predominantly African American association which services a predominantly African American clientele. Most of its members are located on the south side of Atlanta and most of its members traditionally represent buyers. The Empire Board alleges that, because of Metro's requirement that its members also belong to the Realtors, Empire is losing members. Some firms that otherwise would join the Empire Board cannot afford membership with both the Realtors and the Empire Board.

B. *Procedural History*

Plaintiffs filed their complaint on December 22, 1988, alleging antitrust and Fair Housing Act violations. Wendell White and others moved to intervene in this action, but the motion was denied. Following discovery, the parties filed cross motions for summary judgment. The district court granted defendants' summary judgment mo-

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[1] While Metro is owned by the DeKalb Board of Realtors, Thompson and most of the members of the Empire Real Estate Board would be under the jurisdiction of the Atlanta Board of Realtors if they joined the Realtors.

tion. The plaintiffs brought this timely appeal of the district court's dismissal of the antitrust claims.[2]

II. ANALYSIS

A district court's order granting summary judgment is subject to de novo review by this Court. *See Shipes v. Hanover Ins. Co.*, 884 F.2d 1357 (11th Cir.1989).

A. *Standing*

The question at the heart of standing analysis is whether the particular litigant before the court is entitled to have the court adjudicate the particular claim presented. *See Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). There are two plaintiffs to this action: Empire and Thompson; there are basically three different antitrust claims alleged: an illegal tying arrangement; a conspiracy to monopolize a market; and an illegal group boycott.

1. Empire's Standing to Litigate the Three Claims

Empire is an unincorporated association. As such, it has standing to allege certain injuries suffered directly by the organization, *see id.* at 511, 95 S.Ct. at 2211, and standing to bring certain claims on behalf of its members. *See id.*

Empire has standing to directly bring the tying claim. We have recently held that an antitrust standing analysis involves a two-pronged inquiry into whether the plaintiff has suffered an antitrust injury and whether the plaintiff is an efficient enforcer of the antitrust laws. *See Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir.1991). The "antitrust injury" is satisfied when the plaintiff "plead[s] and prove[s] that the injury [it

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[2] Because the plaintiffs have not specifically appealed the district court's disposition of the Fair Housing Act claims, the plaintiffs have waived any objection to summary judgment on this issue.

has] suffered derives from some anticompetitive conduct and is the type of injury the antitrust laws were intended to prevent." *Id.* at 1450. Empire competes in the market for professional affiliation with the Realtors. Empire claims that it has lost members because the Realtors have entered an illegal tying arrangement with Metro which forces Empire members to drop their affiliation with Empire and join the Realtors. Assuming that Empire can prove these allegations, it has alleged a valid antitrust claim. *See* Section II C, *infra*. Empire is also an efficient enforcer of the antitrust laws because the alleged injury is neither speculative nor indirect. *Todorov*, 921 F.2d at 1451.

Empire has standing to bring a suit on behalf of its members for the conspiracy to monopolize the multilist service market claim. The courts apply slightly different tests to examine when an organization has standing to bring a claim directly and when the organization has standing to bring the claim on behalf of its members. Empire may bring a suit on behalf of its members when:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

United Auto Workers v. Brock, 477 U.S. 274, 282, 106 S.Ct. 2523, 2529, 91 L.Ed.2d 228 (1986). First, Empire's members could bring a suit in their own right for the conspiracy to monopolize the multilist market claim. There is evidence in the record supporting Empire's assertion that nearly 40% of Empire's members also belong to the Realtors and use Metro. It is beyond dispute that, as consumers of the multilisting service, the Empire members may bring an action alleging antitrust violations which force them to pay excessive fees. *See Associated Gen. Contractors v. California State Council of Carpen-*

ters, 459 U.S. 519, 530, 103 S.Ct. 897, 904, 74 L.Ed.2d 723 (1982). Empire is asking for injunctive relief including a request that the court order Metro to eliminate its membership requirements and lower its fees. Both of these requests could be brought by an individual Empire member. Second, the suit is germane to the organization's purpose since Empire is a professional organization which strives to help its members perform as brokers. *Cf. United Auto Workers v. Brock*, 477 U.S. at 286-87, 106 S.Ct. at 2530-31 (discussing the U.A.W.'s purpose). Third, Empire is not seeking monetary damages but only injunctive relief; therefore as the Court noted in *U.A.W. v. Brock*, the association does not need the participation of its members to bring the suit. *Id.* at 287, 106 S.Ct. at 2531.

Empire also has standing to bring a suit on behalf of its members for the group boycott claim. Empire's members could bring a suit in their own right for the group boycott claim. There is evidence in the record that other members of Empire, including Thompson, would like to use Metro's multilist service but are ineligible because of the alleged group boycott. And Empire is asking for injunctive relief that is germane to the organization's purpose and could be brought by the association without the participation of the members.

2. Thompson's Standing to Litigate the Three Claims

Thompson has standing to litigate the tying claim and the group boycott claim. Thompson applied to use Metro's multilist service but his application was denied because he refused to purchase the tied product, membership in the Realtors. Our circuit has recognized, in a related context, that an attempt to enter a market coupled with a showing of preparedness is sufficient to establish an injury in fact, which is one of the bases of standing. *See Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633 (5th Cir.1966). Therefore, in cases such as Thompson's,

a defendant cannot benefit by the application of the standing doctrine from the fact that it is able to prevent the plaintiff from becoming a consumer of its product. As long as the plaintiff made a reasonable attempt to enter the market, our Circuit's case law recognizes that the plaintiff has standing to contest antitrust violations which create barriers to that market. Therefore, Thompson can litigate the validity of the entry barriers which prevented his use of the multilist service. These entry barriers constitute the bases of the tying claim and the group boycott claim. Moreover, the injuries which stem from Metro's ability to prevent Thompson from becoming a multilist service user are antitrust injuries and Thompson would be an efficient enforcer of the antitrust laws because the injuries are suffered directly.

Thompson, however, lacks standing to litigate the conspiracy to monopolize claim. The plaintiffs allege that Metro has conspired to monopolize the multilist market for the southside of Atlanta. The plaintiffs further contend that this alleged monopoly allows Metro to raise its prices and force Metro's users to join the Realtors.[3] The bulk of the antitrust violations from these actions are covered by the tying claim and the group boycott claim, and thus Thompson has standing to challenge them as tying or boycott claims. However, the high user fees are actionable as an entry barrier under the group boycott theory and under the conspiracy to monopolize theory. While Thompson has standing to challenge them to the extent that they constitute an entry barrier, Thompson is presently not a user of Metro and has not been directly affected by the high fees. Therefore, he lacks standing to bring this claim.

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[3] It is important to recognize that Thompson and Empire are not alleging that they are either actual competitors or potential competitors in the market for multilist services. Therefore, they are not alleging that Metro has harmed them by excluding them from the market. They are alleging harm because Metro has raised its prices and because Metro forces its users to join the Realtors.

B. *The Relevant Market*

On a very simplistic level, antitrust law is concerned with abuses of power by private actors in the marketplace. Therefore, before we can reach the larger question of whether Metro violated any of the antitrust laws, we must confront the threshold problem of defining the relevant market. Markets are defined in terms of two separate dimensions: products and geography. Once we have defined the relevant market, we can examine Metro's position within the market, determine Metro's "market power," and thereafter determine whether Metro had enough power within the marketplace to abuse its position.

It is undisputed that the relevant product market is the market for multilist services.[4] The parties, however, strongly dispute the geographic boundaries of that market. The plaintiffs argue that the relevant geographic market is the south side of Atlanta. The defendants argue that the relevant geographic market constitutes all of Atlanta. The district court ruled in favor of the defendants, stating that "[t]he relevant geographic market is not limited to the southside of Atlanta but encompasses the area of effective competition within which the defendants operate [which includes all of Atlanta.]"

The Supreme Court in *United States v. Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963), explained that the concept of a geographic market is essentially an economic concept in which the courts should examine "supplier-customer relations." *Id.* at 357, 83 S.Ct. at 1738. The goal is to determine how economic actors function in terms of where buyers seek supplies and sellers seek purchasers. By examining transportation and other transaction costs as well as buyer

[4] As will be discussed below, *see* section II C 1, *infra*, the parties do dispute whether there is a second product market, the market for professional affiliation.

preferences, it is possible to determine if a given area should be viewed as a single market. *Id.* at 358, 83 S.Ct. at 1738. As the Court noted, " 'the area of effective competition in the known line of commerce must be chartered by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies.*' " *Id.* at 359, 83 S.Ct. at 1739 (emphasis in orginal) (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 627, 5 L.Ed.2d 580 (1961)). Courts, when they are defining the contours of a given market, should try to recall that the purpose of this task is to enable the courts to define market power. Thus we are required to exclude irrelevant information about purchasers and sellers who are not part of a market. By erroneously including potential sellers in a market when, in fact, those sellers are not members of that market, a court dilutes the defendant's role in the market and thereby risks erring in its ultimate determination of whether there has been an antitrust violation.

Viewed in light of *Philadelphia National Bank*, the district court's elliptical determination of the geographic market is less than satisfying. The district court's opinion states its conclusion as to the relevant geographic market without explaining how it reached this conclusion. It appears that the district court merely accepted the area in which Metro operates as the relevant geographic market without considering the nature of the "supplier-customer" relationship. The process of defining a geographic market is more difficult when the courts are attempting to define a geographic market for something as intangible as information contained in data banks and conveyed via computers. While it is common to use the term "geographic market" in defining the parameters of a relevant market, it is misleading for courts to confine their analysis solely in geographic terms. The *Philadelphia National Bank* Court focused on the effects of "buyer

preferences" as one of several factors which help define the contours of a given market. While transportation costs and the like may be the primary cause of market barriers which help define the parameters of markets in hard commodities such as steel, *see United States v. Columbia Steel Co.*, 334 U.S. 495, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948), buyer preferences may be the more important cause of market barriers in intangible markets.[5] In the context of markets which deal in intangibles, the courts should examine transaction costs, transportation costs, and buyer preferences, as *Philadelphia National Bank* commanded, and thereby exclude all those potential sellers, regardless of where they are located, from the analysis of the market when buyers do not "practicably" turn to them for supplies. *Id.*

With this in mind, the district court erred in accepting Atlanta as the relevant geographic market. The parameters of a given market are questions of fact, *see Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560 (11th Cir.1983), and therefore summary judgment is inappropriate if there are material differences of fact. On one hand, the defendant came forward with some evidence that Atlanta is a unitary market. But this was rebutted by the plaintiff who placed into the record considerable evidence suggesting that Atlanta is not a homogeneous real estate market and that real estate brokers specialize in different areas of the city. Moreover, the plaintiffs in this action, Empire and Thompson, specialize in real

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[5] This case is an example of how the process of defining the parameters of the product markets and the geographic markets can be viewed as somewhat interchangeable. *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv.L.Rev. 937, 981 (1981). We could, for example, refer to the product market as those multilist services specializing in the south Atlanta real estate market or we could define the product market as multilist services and the geographic market as the south side of Atlanta. In the end, it makes little difference how one approaches the problem as long as the end result, the definition of the market, is correct.

estate located on the south side of Atlanta. Therefore, the plaintiffs "can practicably turn for supplies" only to those multilist services which include south side listings. It is therefore inappropriate to resolve this dispute on a motion for summary judgment.

C. *The Tying Claim*

The plaintiffs claim that Metro and the DeKalb Board of Realtors have been engaging in an unlawful tying arrangement. The plaintiffs allege that Metro's dominance in the market for multilist services allows it to force brokers into accepting the tied product, membership in the Realtors professional association in order to obtain the tying product, use of the multilist service.

Any alleged antitrust violation may be analyzed under either a *per se* rule or a rule of reason. This Court has held that unless the alleged anti-competitive behavior falls within a few narrow classes, the behavior should be analyzed under the rule of reason. *See United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir.1980). While tying arrangements are one of the classic *per se* forms of anti-competitive behavior, *see Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608-10, 73 S.Ct. 872, 880-81, 97 L.Ed. 1277 (1953), we have recognized that tying claims can also be analyzed under the rule of reason. *See Tic-X-Press, Inc. v. Omni Promotions Co. of Ga.*, 815 F.2d 1407 (11th Cir.1987). This Court has held that unless the plaintiff is able to show all the elements of a *per se* tying claim, the claim must be analyzed under the rule of reason. *Id.* The four basic elements of a *per se* tying claim are:

> 1) that there are two separate products, a "tying" product and a "tied" product; 2) that those products are in fact "tied" together—that is, the buyer was forced to buy the tied product to get the tying product; 3) that the seller possesses sufficient economic

> power in the tying product market to coerce buyer acceptance of the tied product; and 4) involvement of a "not insubstantial" amount of interstate commerce in the market of the tied product.

Id. at 1414. This Court in *Keener v. Sizzler Family Steak House*, 597 F.2d 453 (5th Cir.1979), added a fifth requirement that the tying company have an economic interest in the tied product.

Metro argued before the district court that summary judgment should be granted in its favor on all five elements of the tying claim. The district court granted summary judgment only on the coercion prong and the economic interest prong. Metro renews its argument for summary judgment on each of the elements of the claim in this Court. We therefore must analyze each element of the tying claim to determine if summary judgment was appropriate.

1. Two Separate Products or Services

Metro argues that there is only one relevant product, the market for multilist services, and that there are not two separate products. Metro concludes that if there are not two separate products there cannot be any illegal tie between them.

In determining whether there are two separate products, we are guided by *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984), which held that two products are separate for tying analysis when there are two separate markets for the product. *Id.* at 21, 104 S.Ct. at 1563. The question of whether a series of transactions or whether a given product constitutes a separate market is a question of fact. *See Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560 (11th Cir.1983). It is undisputed that multilist services constitute one product market. It is hotly disputed, however, whether there is a second,

separate market for professional affiliation. In its analysis, the *Jefferson Parish Hospital* Court examined billing practices, consumer preferences, and the realities of similar markets in its determination that the market for hospitals is separate from the market for anesthesiologists. *Id.* 466 U.S. at 22-23, 104 S.Ct. at 1563-64.

Metro's main argument is that multilist services are useless without the support services provided by the Realtors and that therefore the two services are actually one product. Metro argues that because brokers using a multilist service create various agency and subagency arrangements, they would be hesitant to use these services if they had doubts about the ethics of the other brokers. Metro has placed considerable evidence in the record that the Realtors help reduce uncertainty and other transaction costs by providing a code of ethics and mandatory arbitration. Therefore, according to Metro, brokers utilizing the multilist service have less hesitancy because they know that should another broker use the multilist service unethically and "steal" a sale or a customer the Realtors will efficiently adjudicate the injured broker's complaint. Metro further states that it essentially had a choice and could have structured its operations so that the code of ethics, arbitration, and other support services could have been either a direct part of the multilist service or an indirect part through the Realtors. Metro complains that it should not be penalized for structuring its business one way rather than another. However, both of Metro's arguments are irrelevant to the question of whether the market for professional affiliation is separate from the market for multilist services. Metro does not discuss billing practices, consumer preferences, consumer impressions, the cross-elasticity of the markets, or virtually anything relevant to the definition of whether there are separate markets.[6]

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[6] Metro raises a second argument which is virtually indistinguishable from the first argument. Metro initially argues that a multi-

Metro next argues that there is no market for professional affiliation because an individual who joins the Realtors gains nothing more than a status. Metro's argument can be interpreted in one of two ways. To the extent that Metro is claiming that services are somehow exempt from the antitrust laws, Metro's argument is meritless. *See generally Jefferson Parish Hospital, supra.* On the other hand, if Metro is claiming that the Realtors do not provide services and that by joining the Realtors one merely is gaining a "status," Metro is wrong to think that by calling a "service" a "status" one can actually alter legal relationships. Even if the Realtors offered no services [7] and a broker who joined the Realtors merely gained some added professional status, we would still need to answer the basic question of whether there is a market for this status. If there is not a market for this status, then it is not a separate product.

In the case at hand, all of the relevant evidence submitted on the question of whether there are two separate product markets indicates that the market for professional affiliation is separate from the market for multilist services. For example, there is evidence that the bill for joining the Realtors is separate from Metro's bill; that a broker can join the Realtors and choose not to use the

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list service would be useless without the support services provided by the Realtors. Metro argues in the alternative that multilist services and the Realtors' other services are in fact one product because they function as one product. Such an argument, if it actually is distinct from the first argument, is nonetheless equally irrelevant to the question of whether the markets are in fact separate. Moreover, the *Jefferson Parish Hospital* Court explicitly found that such a functional analysis is irrelevant to the question of whether there are, or are not, separate markets. *Id.* 466 U.S. at 19 n. 30, 104 S.Ct. at 1562 n. 30.

[7] This assertion may come as a surprise to the members of the Realtors who pay several hundred dollars a year for membership and to the DeKalb Board of Realtors official who, in an interrogatory, listed 27 services provided by the Realtors.

multilist service; that, within Atlanta, there are at least two professional groups competing for members; that some local Realtor groups offer multilist services and some do not; that Metro was once an independent organization that was later purchased by the Realtors who imposed the Realtor membership requirement; and that in other markets, multilist services are independent of professional membership, *see* Federal Trade Commission Staff Report, *The Residential Real Estate Brokerage Industry* 116 (1983) (At the time of this report, there were at least 55 multilisting services operating in the United States that were independent of any local Realtor organization). Based on these facts, we conclude that summary judgment in favor of the defendant on this element of the claim would be inappropriate.

2. Market Linkage

The second step in the tying analysis is to determine if the two products are actually tied together. *Tic-X-Press*, 815 F.2d at 1415. The parties agree that a broker may not use Metro's multilisting service without joining the Realtors. Therefore, there is not any actual dispute over whether the markets are tied.[8]

3. Economic Coercion

One of the bases of the district court's grant of summary judgment was its conclusion that the plaintiffs failed to produce sufficient evidence that Metro had enough

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[8] The Court in *Tic-X-Press* required the plaintiffs to prove both tying and coercion to satisfy this element and to prove market power and coercion to satisfy the third element of tying analysis. We have chosen to reformulate the test to simplify the analysis. Under this reformulation, plaintiffs must prove that the products were tied and then, for the third element, plaintiffs must prove that the defendants have sufficient market power to coerce buyers. Therefore, a plaintiff must prove coercion only once. This reformulation has no substantive effect other than bringing some analytical clarity to an otherwise murky area.

economic power due to its multilisting service to coerce brokers into joining the Realtors. In order to prove the economic coercion prong of the tying analysis, the plaintiffs must prove both that Metro has "sufficient market power," *Tic-X-Press*, 815 F.2d at 1420, within the tying market and that Metro has wielded its market power to force brokers to "buy a product that [they do] not want or would have preferred to buy elsewhere on other terms." *Id.* at 1416.

The plaintiffs first must prove that Metro has sufficient market power within the relevant product market to coerce brokers into choosing the Realtors as their professional association if Metro so desires. We have already concluded that there is a material question of fact whether the tying market is that portion of multilisting services which contains listings on the south side of Atlanta or that portion of multilisting services which contains listings in Atlanta. Thus, this case needs to be remanded for this initial determination. On remand the district court should then use this definition of the relevant market to determine whether the plaintiffs have proven market power.

Metro argues that regardless of which set of boundaries defines the market, summary judgment is warranted because it lacks the requisite market power. In *Tic-X-Press*, this Court stated that market power "can be sufficient even though the seller does not dominate the market . . . Economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." *Id.* at 1420. The Supreme Court in *U.S. Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977) (*Fortner II*), stated, "the question is whether the seller has some advantage not shared by his competitors in the market for the tying product." *Id.* at 620, 97 S.Ct. at 867. The *Fortner II* Court gave examples of legal barriers (such as patents and copyrights), physical barriers (such as uniquely lo-

cated land), and economic barriers (such as cost advantages), in the tying market. *Id.* at 621, 97 S.Ct. at 868. The *Tic-X-Press* Court added to this list the example of those sellers who benefit from the insulating effect of substantial entry barriers into the tying product market. *Tic-X-Press*, 815 F.2d at 1420.

The district court held that the plaintiffs have not demonstrated sufficient market power. There are two dimensions to its ruling. First, the district court held that there is no evidence in the record of "the defendant's ability to force brokers to" alter their choice of professional associations. Second, the district court held that Metro has no "cost advantage . . . that cannot be duplicated." And, therefore, other groups could start a competing multilist system and challenge the defendant's market power.

Metro claims that it does not have any disproportionate market power because other multilist systems compete with it and brokers can use alternatives to multilist systems. Metro claims that an individual who does not want to join the Realtors but nonetheless wants to use a multilist system could join First Multiple. And Metro claims that brokers could use other methods of determining what properties are for sale. Assuming, however, that the market is defined as those multilist systems with listings on the south side of Atlanta, there is evidence in the record that First Multiple is not a part of that market. While First Multiple may in fact compete with Metro in Cobb County and the north portion of Fulton County, there is evidence in the record that First Multiple has few listings on the south side of Atlanta. As for the south side of Atlanta, the record reflects that Metro has no competition except for an occasional listing by First Multiple. Moreover, there is considerable evidence in the record that multilist services are a necessity for brokers. There are several affidavits and depositions which state that it is difficult to survive as a broker without the

use of a multilist service. Finally, there is considerable evidence placed into the record that the multilist market has a very low cross-elasticity. For example, there is evidence that the only alternatives to a multilist system are poor substitutes: plaintiff Thompson spoke at length in his deposition that without a multilist system he spends hours every day driving around taking notes on houses for sale, that this method is costly, extremely inefficient, and not very timely; there is also evidence that a non-computerized multilist system has been attempted by Empire but failed because it was not timely enough and that published magazines also are a poor substitute.

As for the second basis of the district court's holding, Metro claims that the district court was correct that there are no high barriers to entering the multilisting service market. Metro notes that the physical assets can be cheaply purchased. While the plaintiffs agree with Metro that the physical assets of a multilist service can easily be purchased at costs comparable to those initially paid by Metro, the plaintiffs contend that there are other barriers to competition in the multilisting service market. The plaintiffs argue that they have met their burden of production by placing into the record proof that a new multilist service needs to build a substantial number of listings before it can become useful. The plaintiffs argue that Metro has built an insurmountable amount of good will and the plaintiffs point out that an individual attempted to compete with Metro and that for a variety of reasons, including this good will barrier, his effort failed. Under *Tic-X-Press*, *supra*, such a barrier would be sufficient to establish market power.

In short, there is a material issue of fact as to whether the defendants have the necessary market power. There is evidence in the record suggesting that multilist systems are necessary, that there are few realistic substitutes, that there are entry barriers to the market, and that Metro may not have any competitors.

To satisfy the coercion element of the claim, the plaintiffs need to show that Metro not only has this market power but also has wielded this market power to force brokers to alter their choice of professional associations. Metro denies wielding its market power and contends that there is no evidence in the record supporting this claim. However, it is undisputed that Metro requires brokers to join the Realtors. There also is evidence in the record stating that the expense of dual membership in trade groups can be prohibitive for some brokers, and that 400 of Empire's prospective and current members did not join Empire or quit Empire because of the prohibitive cost.[9] The record also contains the following affidavits: three affidavits stating that the individuals were members of the Realtors and of Empire and that they wanted to quit the Realtors but could not because Metro was too important to their business; three affidavits from Empire members stating that they would like to use Metro but they could not afford membership both in the Realtors and in Empire; seven affidavits from Realtor members who wanted to quit the Realtors and join Empire but could not afford either to lose their access to Metro or to pay a second set of dues for membership in a professional association; and one affidavit from an Empire member who would like to use Metro, evidently can afford membership in both the Realtors and Empire, but dislikes the Realtors because of their past history of discriminating against African Americans. Under *Tic-X-Press*, it is

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[9] Metro dismisses Empire's affidavit about lost members as "conclusory, self-serving and factually unsupported." As for Metro's claim that the affidavit is self-serving, we would be surprised if any party ever submitted an affidavit that was not self-serving. Moreover, this attack on the credibility of the witness is inappropriate during a motion for summary judgment. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). As for Metro's claim that the affidavit was factually unsupported, the affiant was an officer of Empire who spoke about her personal knowledge of the membership.

clear that summary judgment is inappropriate on the question of whether there was any actual coercion. *See Tic-X-Press*, 815 F.2d at 1417 (one example is enough to demonstate coercion).

4. "Not Insubstantial" Effect on Interstate Commerce

The plaintiffs also claim that they have demonstrated that the tie had more than an insubstantial effect on interstate commerce. The Supreme Court in *Fortner Enterprises v. United States Steel (Fortner I)*, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969), held that the dollar volume in the tied market (in this case, the market for professional affiliation) affected by the alleged antitrust violation must be more than "*de minimis*" to comply with the "not insubstantial" standard. *Id.* at 501, 89 S.Ct. at 1257. Moreover, the gross dollar amounts need not be compared to the overall market to meet this standard. *Id.* This Court has held that $325.00 is insubstantial, *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486 (11th Cir.1985), and that $10,091.07 is not insubstantial. *Tic-X-Press*, 815 F.2d at 1419.

The question therefore is whether this illegal tie has a "not insubstantial" effect on commerce in the tied market. The plaintiffs claim there is sufficient evidence in the record to support this element of the claim. There is evidence that Empire has lost close to 400 members due to this allegedly illegal tying arrangement.[10] There is also evidence that Empire charges $75.00—175.00 in annual dues. The loss of just one year's dues from these

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[10] The plaintiffs also claim that the dollar amounts are substantial because there is support in the record that Thompson and others have lost thousands of dollars in lost sales due to their lack of access to a multilisting service. However this loss is not a loss within the tied market because the tied market is the market for professional affiliation.

members results in a loss of between $30,000.00—70,000.00 which is clearly substantial.[11]

5. The Economic Interest Question

The district court also granted summary judgment because the plaintiffs failed to show that Metro had an economic interest in the Atlanta Board of Realtors. The Realtors are structured like many organizations; all the local chapters of the Realtors belong to a state organization and each of the state organizations belongs to the national organization. Among the several local Realtor organizations in the greater Atlanta area are the Atlanta and DeKalb Board of Realtors. While Metro is wholly owned by the DeKalb Board of Realtors, Thompson and most, if not all, of Empire's members are within the jurisdiction of the Atlanta Board of Realtors and would have to join that Realtor association to use Metro.

The economic interest standard has been applied three times in this Circuit. *Midwestern Waffles, Inc. v. Waffle House*, 734 F.2d 705, 712 (11th Cir.1984); *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453 (5th Cir. 1979); and *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 377 (5th Cir.1977). In each of these cases, the plaintiffs were franchisees challenging a franchisor's detailed rules specifying which products could be sold at the franchise, and in each of these cases, the franchisor had absolutely no financial interest in the products. The court in *Keener* stated that a tying claim fails when the "company has absolutely no interest in the sales of a third company whose products are favored by the tie-in." *Keener*, 597 F.2d at 456. The plaintiffs imply that we should limit the economic interest prong to franchise cases. Although this standard has been applied only in franchise cases and the need for this rule appears

[11] The plaintiffs could also prove a not insubstantial effect on the tying market by determining how much money the Realtors make from brokers who join the Realtors solely in order to use the multilisting service.

to be best suited to such cases, we do not need to limit this economic interest prong to situations involving franchises,[12] because there is evidence in the record to support a finding that there was a sufficient economic interest.

We cannot say that Metro has "absolutely no interest" in the size of the Atlanta Board of Realtors. Because of the close nature of the relationships between all the Realtor organizations, Metro is benefited and therefore has an interest in having Thompson and the other Empire members join the Atlanta Board of Realtors. While Metro is owned by the DeKalb Board of Realtors, both the DeKalb and the Atlanta Boards belong to the Georgia and National Boards of Realtors. Moreover, a portion of every dollar paid to the local board is paid to the state and national boards. There is evidence in the record showing that the state and national boards then use the money to perform various services for the local boards. In an interrogatory, the DeKalb Board of Realtors listed nineteen benefits received from the Georgia Association of Realtors and seventeen benefits received from the National Association of Realtors. Moreover, the plaintiffs submitted an affidavit from an individual who attended a Georgia Association of Realtors meeting in which the group voted to send up to $15,000 to the DeKalb board to help in the defense of this action. Therefore, there is sufficient evidence in the record for us to conclude that Metro has something more than "absolutely no interest" in the size of the Atlanta Board of Realtors.

In conclusion, it appears that the plaintiffs have placed into the record sufficient evidence alleging the five prima facie elements of a per se tying violation.

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[12] Arguably, though, the economic interest prong has already been implicitly limited to franchise cases since the economic interest prong has been ignored in nonfranchise cases. *See Tic-X-Press, supra.* This prong has also been criticized by other courts. *See Gonzalez v. St. Margaret's House Housing Development Fund Corp.*, 880 F.2d 1514 (2d Cir.1989).

D. *The Group Boycott Claim*

The plaintiffs also complain about the restrictive membership policies adopted by Metro. The plaintiffs complain that Metro's requirement that its members belong to the Realtors violates the antitrust prohibition on group boycotts. Far from writing on a blank slate, we are faced with a considerable body of precedent explaining the group boycott effects of a Georgia-based multilist service's membership requirements. In the comprehensive opinion of *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir.1980), we noted that multilist services have many pro-competitive effects. Most importantly, multilist services help eliminate imperfections in the marketplace by increasing the availability of information. *Id.* at 1368. As a result of the pro-competitive effects inherent in multilist services, this Court recognized that it could not, as a matter of law, condemn the multilist service's membership criteria as a *per se* violation of the antitrust laws. *Id.* at 1369. The plaintiffs do not contest this application of *Realty Multi-List* to the case at hand. Following *Realty Multi-List*, we therefore hold that Metro's membership requirements are not *per se* antitrust violations.

The *Realty Multi-List* court, however, held that the membership requirements for a multilist organization can, under a rule of reason analysis, violate the antitrust laws. The *Realty Multi-List* court noted the significant economic harm that multilist services cause when they exclude brokers from their service. *Id.* at 1370-71. First, the excluded broker's listings will not be distributed as widely as possible, resulting in inefficient sales prices. Second, the exclusion reduces the competition among brokers and could result in less competition for brokerage fees. *Id.*; *See also* Federal Trade Commission Staff Report, *The Residential Real Estate Brokerage Industry* 151-55 (1983) (finding that discount brokers tend not to be members, for whatever reason, of multilisting services).

"Thus where a broker is excluded from a multiple listing service without an adequate justification in the competitive needs of the service, both the broker and the public are clearly harmed. [I]n these circumstances, the exclusion from the association will be found to violate Section 1 [of the Sherman Act]." *Realty Multi-List*, 629 F.2d at 1371 (emphasis added). Therefore, in order to determine whether summary judgment was warranted we must first determine whether Metro has the requisite market power, and second we must examine whether Metro has any justification in terms of fostering competitiveness for its entry requirements.

1. Market Power

The district court granted summary judgment on the threshold question of market power. The district court noted that *Realty Multi-List* required an initial determination of whether the service has sufficient market power to justify this heightened scrutiny of its membership requirements. The rationale adopted by *Realty Multi-List* was that powerful market forces, essential to the economic survival of a competitor, must be open to all competitors. The question of market power is a factual one. *Id.* at 1373. In *Realty Multi-List*, we defined market power as a question of whether the multilist service has "'sufficient economic importance that exclusion results in the denial of the opportunity to compete *effectively* on equal terms.'" *Id.* at 1373 (emphasis in the original) (quoting Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 Colum.L.Rev. 1325, 1346 (1970)). Market power turns on the number of brokers who use the service, the total dollar amount of annual listings, and a comparison of the rate of sales using the multilisting service to the market as a whole. *Realty Multi-List*, 629 F.2d at 1373-74. It is important to note that the Court in *Realty Multi-List* assumed that testimony stating that the multilist system was used by

the vast majority of brokers in the relevant geographic market and that it was very important to the economic survival of a brokerage was sufficient to constitute the requisite market power. *Id.* at 1374.

In the case at bar, the district court erroneously granted summary judgment on the market power issue. The court first erred by defining the relevant market as all of Atlanta when, at the very least, there is a material difference of fact as to whether some smaller geographic unit is the relevant market. The district court also erred in requiring the plaintiffs to produce exact percentages showing Metro's position in the market. Our case law has never required the showing of exact percentages, especially when both sides concede that such percentages do not exist. Finally, summary judgment is inappropriate because there is a question of material fact as to the existence of market power. On the one hand, Metro claims that it does not have sufficient market power to raise any antitrust concerns. On the other hand, the plaintiffs put into evidence testimony about the dominating role of Metro on the south side of Atlanta, testimony that Metro has no effective competition on the south side, and evidence of the large number of listings and sales that have ultilized Metro. In short, there is sufficient contradictory evidence that summary judgment is inappropriate on this issue.

2. The Membership Requirements

Metro argued to the district court, and renewed its argument in this Court, that it should be awarded summary judgment because even if it has sufficient market power its membership requirements are acceptable under *Realty Multi-List*. The district court did not reach this argument because of its disposition of the market power question. Because this is a pure question of law and because this argument is properly before this Court, we turn to the question of whether the membership require-

ments are acceptable under *Realty Multi-List*. *Id.* at 1383 n. 67 (reaching the issue of whether the membership requirements were reasonable despite the need to remand the case for a determination of market power).

The *Realty Multi-List* court held that, once the plaintiffs have shown the requisite market power, the multilist service must justify its restrictive membership requirements. The court noted that the restrictive membership requirements must be evaluated in light of an existing, extensive series of state laws and regulations. The court held that it is necessary to compare the proffered justification of the membership requirements to the state laws and if the multilist service's concern which motivated the restrictive membership requirements is already covered by state real estate brokerage law then the multilist service must "make a showing either that the legitimate needs of the service require protection in excess of that provided by the state or that the state does not adequately enforce its own regulations." *Id.* at 1380. The burden of proof is on the multilist service. *Id.* at 1380-81 n. 61. In the event that the concern underlying the membership requirements is a subject not covered by the regulations or the regulations are not enforced by the state, the court held that we must evaluate the suggested justification to see if it is "reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end." *Id.* at 1375.

Metro proffers two main justifications for requiring its users to join the Realtors. First, Metro explains that Article 21 of the Realtor code of ethics imposes a "no soliciting" rule. Metro explains that few brokers would be willing to enter his or her client list into Metro's system without assurances that other brokers will not "steal" the list and solicit the clients directly. Metro explains that this justification is pro-competitive because the rule encourages more brokers to use the system and therefore increases the efficiencies of the market. Second,

Metro explains that Article 14 of the Realtor code of ethics requires Realtors to arbitrate all disputes. Metro explains that this also encourages brokers to use the system because most disputes are over relatively small sums of money and traditional legal remedies are not cost effective for these disputes.

We therefore must examine the Realtor membership in light of these two justifications and the *Realty Multi-List* standards. It is clear that Georgia state law does not impose any arbitration requirements in potential realtor disputes, *see generally* Ga.Code Ann. §§ 43-40-1 through 43-40-32 (1988 & Supp.1990), or any "no solicitation" rule. *Id.; cf.* Ga.Code Ann. § 43-40-25(a)(26) (Supp. 1990) (making it an unfair trade practice to knowingly solicit an exclusive listing from an owner who has already entered an exclusive listing contract with another broker.) Moreover, *Realty Multi-List* held that there is a legitimate competitive justification for a multilist system to adopt a membership rule which is designed to assure the membership of the ethics of the other members and thereby induce individuals to join the system. *Realty Multi-List*, 629 F.2d at 1375. Therefore, the question we must address is whether the realtor membership requirements are "reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end." *Id.* at 1375. While the goal of inducing brokers to join the multilist system is a legitimate pro-competitive justification and the "no-solicitation" and arbitration rules are both reasonable and narrowly tailored to that end, this lawsuit is not questioning the validity of those two rules. The question before this Court is whether it is necessary to impose Realtor membership requirements in order to obtain the same ends. It is clear that the Realtor membership requirements are not narrowly tailored to the goal of inducing brokers to join the multilist system. Metro could easily impose its own "no solicitation" and arbitration rules on its members. Such rules would not

constitute a group boycott and would achieve the same ends that Metro claims the Realtor membership requirements achieve.

Therefore, on remand, it is necessary to determine whether Metro has sufficient market power under *Realty Multi-List*. In the event that the district court finds that Metro has the market power, it must find that the Realtor membership requirements are an illegal group boycott.[13]

E. *The Conspiracy to Monopolize Claim*

Finally, the plaintiffs bring a conspiracy claim under section 2 of the Sherman Act. *See* 15 U.S.C.A. § 2 (1973).[14] There are three elements to a section 2 claim. The plaintiffs must prove: first, the existence of "concerted action by knowing participants," *Key Enterprises of Delaware v. Venice Hospital*, 919 F.2d 1550 (11th Cir.1990); second, a specific intent to monopolize, *id.*; and third, an overt act. *Id.*

The plaintiffs argue that the record contains evidence of this conspiracy to monopolize. The plaintiffs allege that Metro was once an independent organization, that the owner of Metro met with important individuals in the National Association of Realtors, that at this meeting the owner of Metro agreed to link with the DeKalb Realtors because such a linkage would help in its competition against First Multiple. From this evidence, the plaintiffs argue that Metro intended to conspire to monopolize the multilisting market. With this monopoly as a base, the plaintiffs argue that Metro attempted to conspire to monopolize the market for professional associations.

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[13] Of course, the Realtors are free on remand to raise other justifications for the realtor membership requirements.

[14] In their complaint, the plaintiffs also bring a conspiracy claim under section 1 of the Sherman Act. Despite the fact that section 1 claims are usually easier to prove, *see Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), the plaintiffs have abandoned their section 1 claims.

The district court assumed that the evidence of the meetings between Metro and the National Association of Realtors was sufficient evidence of the first element, the concerted action element, to survive the summary judgment motion. Metro dismisses the evidence in a one sentence assertion that it is not sufficiently credible and therefore summary judgment should issue. We reject Metro's argument as meritless. Courts do not make credibility judgments when deciding motions for summary judgment. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Moreover, the fact that participants at the meeting conceded that they agreed to link up is sufficient to establish concerted action. *See Interstate Circuit v. United States*, 306 U.S. 208, 226, 59 S.Ct. 467, 474, 83 L.Ed. 610 (1939).

Metro next argues that the district court correctly granted summary judgment on the intent to monopolize element of the claim. The record supports the defendants' assertion that the intent of the conspiracy was not anticompetitive because the purpose was to foster competition. Walter Scott, one of the early presidents of Metro, stated that he and the other members of the Metro board of directors decided to merge Metro into the DeKalb Realtors because the Metro board recognized the potential power of a multilist service within the real estate community and the Metro board was afraid that Metro would somehow be purchased by First Multiple. Scott claimed that the board was fearful because First Multiple, at that time, was an exclusive service [15] and the board feared the effect on the real estate community of an exclusive service's purchasing Metro and closing it to the vast majority of brokers. Thus, the Metro board merged itself with the Realtors in order to stay relatively open. The plaintiffs cannot point to anything in the record,

[15] Following a Department of Justice lawsuit and a consent decree, First Multiple is now an open service.

which suggests any other intent by those at the meeting, and the plaintiffs especially cannot find any anti-competitive intent by those at the meeting. Therefore, there is no material issue of fact appropriate for trial and we affirm the district court's grant of summary judgment to the defendants on this claim as a matter of law.[16]

III. CONCLUSION

We therefore AFFIRM the district court on its grant of summary judgment in favor of the defendants on the conspiracy to monopolize claim. We REVERSE the district court on its grant of summary judgment in favor of the defendants on the tying claim and the group boycott claim. We REMAND this case to the district court for further proceedings not inconsistent with this opinion.

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[16] The district court, however, applied an erroneous summary judgment standard. The district court granted summary judgment on the basis that the "plaintiffs have produced no evidence that the defendants specifically intended to . . . monopolize [the multilist market.]" The district court however made no specific finding that the defendants first came forward with any evidence suggesting that summary judgment was warranted. As we recently held, "[t]he moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991). The district court did not examine whether the moving party had any evidence on the issue of whether Metro had the requisite intent to monopolize. The district court simply, and incorrectly, put the plaintiffs to their burdens of proof.

Rather than return this case to the district court and waste precious judicial resources, we have consulted the briefs and reviewed the record *de novo*, and we find that while the district court utilized the wrong procedure it arrived at the right result.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:88-cv-2883-RLV

FLETCHER L. THOMPSON, d/b/a FLETCHER L. THOMPSON REALTY and EMPIRE REAL ESTATE BOARD, INC.,
Plaintiffs,

vs.

METROPOLITAN MULTI-LIST, INC., d/b/a METRO LISTING SERVICE and DEKALB BOARD OF REALTORS, INC.,
Defendants.

ORDER

[Filed Jun. 28, 1990]

This antitrust action is before the court on the parties' cross motions for summary judgment and the plaintiffs' motion to compel.[1] The plaintiffs, Fletcher Thompson Realty and Empire Real Estate Board ("Empire"), allege that Metropolitan Multi-List's ("Metro MLS") requirement that members of the multiple listing service also be members of the board of realtors violates sections

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[1] Based on the court's decision as to the defendants' Motion for Summary Judgment the plaintiffs' Motion for Partial Summary Judgment and Motion to Compel are rendered moot. Also pending is a Motion for Reconsideration of the court's previous denial of a motion to intervene; for the same reasons that motion also is now moot.

1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, the Fair Housing Act, 42 U.S.C. § 3604, and 42 U.S.C. § 3606.

Metro MLS is a real estate multiple listing service wholly owned by the co-defendant, DeKalb Board of Realtors ("DeKalb Board"). Metro MLS offers a shared information service through which its members advertise real property listings and offers of commission splits to assisting brokers. As a condition of membership in and access to its multiple listing services, Metro MLS requires real estate brokers to be members of a board of realtors. It is this membership requirement that the plaintiffs challenge.

Plaintiff Fletcher Thompson, a real estate broker, applied to participate in Metro MLS but was denied access to the service because he is not a member of his local board of realtors. He has never applied for a board of realtors membership. Plaintiff Empire is a professional organization predominantly made up of black real estate brokers and sales associates. Like a board of realtors, Empire has an arbitration process available for the resolution of disputes and a code of ethics. Together the parties argue that the requirement of membership in a board of realtors as a precondition to access to Metro MLS services restrains competition in the market for multiple listing services.

Because of the complexity of this action and the numerous arguments made, the court will consider the motions for summary judgment as they relate to each count of the amended complaint. In doing so, the court is mindful that summary judgment should be used sparingly in complex antitrust litigation where motive and intent play leading roles, *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 82 S.Ct. 486 (1962), but also recognizes that the plaintiffs carry the burden of adducing significant probative evidence of the essential elements of the asserted claims and the existence of genuine issues of fact.

COUNT I

Count I of the amended complaint alleges that Metro MLS's membership requirement is a per se violation of section 1 of the Sherman Act because it is an illegal tying arrangement. A particular restraint is considered per se illegal when the restraint is "plainly anticompetitive" and lacking of "any redeeming virtue." *See Broadcast Music, Inc. v. Columbia Broadcasting Co.*, 441 U.S. 1, 8, 99 S.Ct. 1551, 1556 (1979). A practice is plainly anticompetitive and lacking in any redeeming virtue when it denies consumers the opportunity to choose among alternative offers without offering the possibility of any efficiency-producing economic activities. *Id.*

A tying arrangement is an arrangement in which a seller agrees to sell one product, the tying product, only on the condition that the buyer also purchase a second product, the tied product. *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 12, 104 S.Ct. 1551, 1558 (1984). There are four basic elements in a tying claim: (1) two separate products, the tying and the tied product; (2) sufficient economic power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetitive effects in the tied market. *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 711-12 (11th Cir. 1984); *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321 (5th Cir. 1974). Tying agreements are regarded as illegal per se because "they deny competitors free access to the market for the tied product not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6, 78 S.Ct. 514, 518 (1958).

The plaintiffs allege that participation in Metro MLS, the tying product, can be attained only through the purchase of membership in a board of realtors, the tied

product. Thus, the relevant product market is the market for multiple listing services, and the relevant geographic market is that portion of the metropolitan Atlanta area in which the defendants operate. *See Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 628 (1961).

An essential element of a tying claim is a finding that the defendants possess sufficient economic power to restrain free competition. *Midwestern Waffles*, 734 F.2d at 711-12. The defendants possess such economic power if they have the ability to force a purchaser of multiple listing services to do something that he would not do in a competitive market and have some advantage—legal, physical or economic—not shared by their competitors in the multiple listing service market. *See United States Steel v. Fortner Enter., Inc.*, 429 U.S. 610, 620, 97 S.Ct. 861, 867 (1977) (Fortner II); *Tic-X-Press v. Omni Promotions Co.*, 815 F.2d 1407, 1420 (11th Cir. 1987). The plaintiffs allege that the defendants' market power is evident in the fact that the bulk of broker assisted residential real estate business on the south side of Atlanta is conducted through Metro MLS. The plaintiffs further allege that the defendants have an economic advantage over would-be competitors in that Metro MLS's services cannot be effectively duplicated because of the substantial capital outlay required and the unlikelihood of penetrating the multiple listing service market.

It is the plaintiffs' burden to demonstrate sufficient evidence from which a reasonable jury could find that the defendants possess the requisite market power, an essential element of the tying claim. The court finds, however, that the plaintiffs' evidence relating to the defendants' economic power is insufficient as a matter of law. The plaintiffs have produced no evidence of the defendants' ability to force brokers to purchase real estate board memberships other than the general allegations of one real estate broker who stated that "the bulk of

broker-assisted residential real estate business on the south side of Atlanta, by any measure, is conducted through Metro MLS." Affidavit of Sid Venable at 7. The relevant geographic market is not limited to the south side of Atlanta but encompasses the area of effective competition within which the defendants operate, *see Tampa Electric Company*, 365 U.S. 320, 81 S.Ct. 623, and there is no evidence in the record concerning the defendants' position in that market. *See Jefferson Parish Hosp.*, 466 U.S. at 26-27, 104 S.Ct. at 1566 (hospital with 30% share of patients in its market lacked sufficient economic power).

Moreover, there is a competitive multiple listing service, First Multiple Listing Service (FMLS), within the relevant market which does not require board of realtors membership. The plaintiffs have failed to produce any evidence that FMLS is not able to provide substantially the same services as Metro MLS within the relevant market.

Even assuming that the defendants possess the ability to force brokers to purchase board of realtors memberships, the plaintiffs have not demonstrated that the defendants have a cost advantage in operating a multiple listing service. In fact, the existence of FMLS, which operates within at least a portion of the same geographic market, proves that the services can be successfully duplicated and offered on competitive terms. That one real estate broker failed in his endeavor to start a competitive service does not dispute the fact that FMLS can provide substantially the same multiple listing services to its members. The plaintiffs have produced no evidence that FMLS is hindered in the operation of its business by an alleged economic advantage held by Metro MLS. Unlike cases where the unique nature of the tying product gives one party an advantage over its competitors and thus creates a disincentive for competition, *see Tic-X-Press*,

815 F.2d 1407, multiple listing services can and have been effectively duplicated. Furthermore, Empire's business decision not to provide its members multiple listing services is not evidence that the defendants, because they provide such services, have a cost advantage in providing these services.

The plaintiffs' tying claim fails on yet another ground. There is insufficient evidence in the record to support a finding that the defendants have an economic interest in the Atlanta Board or the membership fees collected by it. Because the plaintiff's principal places of business are in Fulton County, Georgia, the specific tied product the plaintiffs must purchase is membership in the Atlanta Board of Realtors. The plaintiffs contend that Metro MLS possesses the necessary financial interest in the Atlanta Board because Metro MLS is a subsidiary of and has an interest in another realtor group, the DeKalb Board. The plaintiffs also imply that Metro MLS has a financial interest in all boards of realtors because they are financially intertwined through the payment of dues to the state and national realtor associations and the benefits conferred on Metro MLS through such associations' lobbying efforts.

The court finds these arguments unpersuasive. There is no evidence that Metro MLS receives any part of the membership fees paid to the Atlanta Board or has any other economic interest in the Atlanta Board. The fact that such a relationship may exist between Metro MLS as a wholly owned subsidiary of the DeKalb Board has no effect on the court's determination of whether Metro MLS has a financial interest in the Atlanta Board. Nor do the efforts of the state and national associations to monitor and improve the industry as a whole create an economic interest in all boards of realtors. At most, these efforts provide incidental benefits to Metro MLS. Similarly, although the Atlanta Board provides arbitration services to resolve disputes among its members and, thus,

Metro MLS need not provide these services, the court finds that this is insufficient to establish the requisite financial interest in the Atlanta Board. The performance of some services, without charge, does not of itself create an economic interest in the Atlanta Board. *See generally Pullen v. Bowen*, 820 F.2d 105 (4th Cir. 1987) (radiologists' reading of x-rays without charge to hospital not evidence of economic interest).

Because the court finds insufficient evidence of the defendants' economic power in the relevant market and no evidence that Metro MLS has an economic interest in the Atlanta Board, the source of the tied product, the plaintiffs have failed to establish an essential element of their illegal tying claim. Therefore, summary judgment is GRANTED as to COUNT I.

COUNT II

The plaintiffs allege in Count II of the amended complaint that the board membership requirement is a per se violation of antitrust laws because Metro MLS is an "essential facility" which the defendants must make available to all real estate brokers and sales associates. The essential facilities doctrine provides that a monopolist's refusal to give competitors reasonable access to an essential facility is an illegal restraint of trade. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977) ("[W]here facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms.").

To establish liability under the essential facilities doctrine the plaintiffs must prove four elements: (1) control of the essential facility by a monopolist; (2) a competitor's inability, practically or reasonably, to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility to the competitor. *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1133 (7th Cir. 1983). The plaintiffs must provide some evi-

dence of each element in order to survive the defendants' motion for summary judgment. The court finds that the plaintiffs have not met this burden.

First, there is insufficient evidence to support a jury finding that the defendants have monopolized the market for multiple listing service privileges in the Atlanta area. A business monopolizes in violation of antitrust laws if it deliberately follows a course of conduct through which it obtains or maintains power to control price or exclude competition in the relevant market. *United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005 (1956). Although the plaintiffs assert generally that the defendants possess the power to exclude multiple listing service competitors, the existence of FMLS proves otherwise. FMLS operates in the same geographic market as Metro MLS, provides substantially the same services, and creates competition in the market for multiple listing services privileges. The fact that Metro MLS may be more efficient or more successful than its competitors in providing such services does not serve as evidence of monopolistic conduct.

Second, even if Metro MLS were a monopolist, the plaintiffs have presented insufficient evidence to prove that Metro MLS, as opposed to another multiple listing service, is essential to the business of real estate brokers and sales associates or that the services are incapable of being duplicated. As discussed above, the existence of FMLS clearly shows that the multiple listing services provided by Metro MLS can be reasonably duplicated. That the plaintiffs have chosen not to duplicate such services is a business decision and not the result of an illegal restraint of trade.

COUNT III

Although the court finds that the membership requirement is not a per se violation of antitrust law, the plaintiffs may still prevail by showing that the requirement,

as it actually operates in the market, unreasonably restrains competition. *See Fortner Enter. v. United States Steel*, 394 U.S. 495, 499-500, 89 S.Ct. 1252, 1256-57 (1969) (Fortner I); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) (membership criteria of multiple listing service subject to rule of reason analysis). This test, known as the "rule of reason," focuses analysis on the competitive significance of the challenged practice and requires courts to void any practice whose anticompetitive effects outweigh its contributions to competition. *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-92, 98 S.Ct. 1355, 1363-65 (1978).

In Count III the plaintiffs allege that Metro MLS's membership requirement violates the rule of reason because it is unreasonable to require membership in a board of realtors when other professional organizations, such as Empire, provide the same or substantially the same arbitration services and codes of ethics which the defendants claim justifies the exclusion of non-realtor board members. Such a limited requirement, the plaintiffs argue, is not justified by legitimate competitive goals.

The plaintiffs, however, have failed to establish an essential element of a claim under the rule of reason. The rule of reason requires a showing that Metro MLS has sufficient market power in the relevant market such that an exclusion from membership not reasonably grounded in competitive needs produces competitive harm. *See Realty Multi-List*, 629 F.2d at 1372. Only if Metro MLS possess such market power does the inquiry turn to the issue of whether the membership requirement is justified by legitimate competitive needs and whether it is narrowly tailored to that end. *Id.* at 1374-75.

In determining whether Metro MLS has sufficient market power the plaintiffs need not demonstrate that Metro MLS has a monopoly in the market for multiple listing

service participation privileges. Rather, the evidence need show only that exclusion from such privileges results in the denial of the opportunity to compete effectively on equal terms. *Id.* at 1373. As evidence of Metro MLS's market power the plaintiffs allege that the vast majority of area brokers belong to Metro MLS, the vast majority of area real estate sale parcels are listed with Metro MLS, and nearly all sales consummated in the area are of parcels listed with Metro MLS.

As discussed above, the plaintiffs have failed to establish the requisite market power in relation to the tying claim. Although the standard of market power applied to a rule of reason claim is somewhat different in that the court must determine whether the exclusion denies real estate brokers the opportunity to compete effectively, the court's findings as to the tying count also apply here.

In addition, the plaintiffs placed in the record evidence concerning the dollar volume of sales made through Metro MLS and general allegations that the vast majority of real estate business in the relevant market is conducted through Metro MLS. Conspicuously absent, however, is any affirmative evidence demonstrating what percentage of the relevant market Metro MLS's sales represent and the percentage or dollar volume of sales made by FMLS, a competitor in the same market. The plaintiffs' citation to a report which states that approximately 90% of homes sold nationally are sold through a multiple listing service in no way identifies the specific market power possessed by the defendants. Although the evidence that is in the record suggests that a substantial amount of sales are made through multiple listing services, there is insufficient evidence that the exclusion of brokers specifically from membership in Metro MLS denies them the opportunity to operate effectively on equal terms.

Because the plaintiffs failed to establish the requisite market power, summary judgment is appropriate as to Count III, and the court need not consider the actual competitive effects of Metro MLS's membership requirement.

COUNT IV

In Count IV of the amended complaint the plaintiffs allege a claim for conspiracy to monopolize in violation of section 2 of the Sherman Act. A section 2 conspiracy to monopolize claim requires proof of (1) a conspiracy; (2) a purpose to achieve monopoly power; and (3) a specific intent to injure the plaintiff and to monopolize. *Hill Aircraft & Leasing Corp. v. Fulton County*, 561 F. Supp. 667, 677 (N.D.Ga. 1982), *aff'd*, 729 F.2d 1467 (11th Cir. 1984). In addition, the plaintiff must submit proof of the relevant product and geographic markets. *Bill Beasley Farms, Inc. v. Hubbard Farms*, 695 F.2d 1341, 1343 (11th Cir. 1983).

In support of the conspiracy claim the plaintiffs rely on evidence that Metro MLS was acquired by the DeKalb Board of Realtors only after a meeting between the local participants and the National Association of Realtors and the affidavit of Mr. Walter Scott, part-owner of the independent Metro Multiple Listing Service, in which he stated that it was his belief that if DeKalb acquired Metro MLS it would have a better chance of competing with First Multiple Listing Service. The plaintiffs also point to the affidavit of Mr. Sid Venable who testified that he attempted to start a multiple listing service on the south side of metro Atlanta but has been frustrated in his attempts by the actions of the local board of realtors and Metro MLS.

Even assuming that the meeting between the National Association of Realtors and the local board raises a question as to the existence of a conspiracy, the court finds that there is insufficient evidence to establish a prima facie case of conspiracy to monopolize. The plaintiffs have produced no evidence that the defendants specifically intended to injure the plaintiffs or specifically intended to monopolize. The fact that the former owner of Metro MLS believed that Metro MLS would attract more mem-

bers if it were acquired by the DeKalb Board of Realtors is not evidence of a specific intent to monopolize. Even considered in the light most favorable to the plaintiffs such testimony serves only as evidence of an intent to compete with FMLS. *See Fortner I*, 429 U.S. at 612-13 n. 1, 97 S.Ct. at 863-64 n. 1 (increasing sales and market share without other intent to monopolize is not forbidden under the Sherman Act). Nor have the plaintiffs produced any evidence that the defendants have engaged in any conduct specifically intended to injure the plaintiffs. Even accepting as true Mr. Venable's statements that the defendants deliberately acted so as to frustrate his attempts to create an independent multiple listing service in the south metro area, Mr. Venable is not a party in this action. Therefore, any injury he may have suffered will not serve as evidence that the defendants intended to injure the plaintiffs.

Because the plaintiffs have failed to establish an essential element of the conspiracy to monopolize claim, the defendants are entitled to summary judgment.

COUNTS V, VI AND VII

In counts V and VI of the complaint the plaintiffs allege that the Metro MLS participation rules violate the Fair Housing Act because they discriminate against black real estate brokers and sales associates in the provision of services in connection with the sale or rental of a dwelling and discriminate against black sellers in the terms, conditions and privileges in the sale or rental of a dwelling. 42 U.S.C. 3604(b) (Supp. 1990). The plaintiffs further allege in Count II that the Metro MLS participation rules in effect deny membership in Metro MLS on account of race in violation of 42 U.S.C. § 3606.

Despite these allegations, the plaintiffs have produced no evidence that any board of realtors or any multiple listing service has discriminated against membership ap-

plicants based upon race. In fact, plaintiff Thompson admitted in his deposition that he had no evidence of such discrimination. The unsupported allegation that black real estate brokers' memory of racism practiced by realtors discourages them from joining a board of realtors or multiple listing service is insufficient to support a Fair Housing Violation claim. Similarly, there is no evidence in the record from which a jury could determine that the benefits of a multiple listing service are not available to black homesellers on the same terms and conditions as they are available to any other homeseller.

Based on the absence of evidence in the record and the absence of issues of material facts, the court hereby GRANTS the defendant's Motion for Summary Judgment on all counts.

SO ORDERED, this 28th day of June, 1990.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
United States District Judge

[Entered on Docket Jul. 05, 1990]

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

September 10, 1991

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case and Names of Parties

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 90-8724 Thompson v. Metro. Multi-List, Inc.
DC DKT NO.: 88-02883 1-CV

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely

/s/ Miguel J. Cortez
MIGUEL J. CORTEZ
Clerk

Reply To:

Pam Holloway
(404) 331-3836

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8724

FLETCHER L. THOMPSON d/b/a Fletcher L. Thompson Realty; EMPIRE REAL ESTATE BOARD, INC.,
Plaintiffs-Appellants,

versus

METROPOLITAN MULTI-LIST, INC., d/b/a Metro Listing Service; DEKALB BOARD OF REALTORS, INC.,
Defendants-Appellees.

WENDELL WHITE d/b/a Empire Realty Co. and E. PEARL PRESLEY d/b/a Pal Realty Co.,
Intervenors-Plaintiffs.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion July 11, 1991)

Before: JOHNSON and COX, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5) the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
United States Circuit Judge

(2)

Supreme Court, U.S.
FILED
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No. 91-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DEKALB BOARD OF REALTORS, INC., and
METROPOLITAN MULTI-LIST, INC.,
Petitioners,

v.

FLETCHER L. THOMPSON and
EMPIRE REAL ESTATE BOARD, INC.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether summary judgment was properly denied as to Sherman Act "tying" claims against a trade association and its wholly-owned trade exchange, where access to the exchange is conditioned upon membership in the parent trade association or an affiliated trade association and upon payment of dues for association services unnecessary to exchange functions, and the record demonstrates market power in the market for trade exchange services.

2. Whether summary judgment was properly denied as to a Sherman Act rule of reason claim against a trade association and its wholly-owned trade exchange, where access to the exchange is conditioned upon membership in the parent trade association or an affiliated trade association and upon payment of dues for association services unnecessary to exchange functions, and the record demonstrates market power in the market for trade exchange services.

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SUMMARY OF ARGUMENT

Respondents oppose the petition for certiorari to the United States Court of Appeals for the Eleventh Circuit. That Court's decision was correct and does not conflict with those of either this Court or the other courts of appeal. Indeed, the principal decision of this Court cited by Petitioners supports the result reached below, rather than that urged by Petitioners. There are no special and important reasons for review of the issue posed by Respondents. Finally, review of this action is premature, because unresolved factual issues may prove to be dispositive. This action was remanded for trial.

ARGUMENT

I. Petitioners Show No Conflict with Decisions of This Court.

Petitioners assert that the Eleventh Circuit opinion is in conflict with decisions of this Court. But this Court has never held that a trade exchange may require its members to belong also to a separate membership organization whose functions, and therefore whose charges, are superfluous to the operation of the exchange. This Court did approve trade exchanges whose facilities were open only to members in *Associated Press v. United States*, 326 U.S. 1 (1945);[1]

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[1] *Associated Press* actually *affirmed* a remedial provision in the trial court's preliminary injunction, forbidding limitation of services to members only. It also affirmed the lower court in failing to find the membership limitation a substantive violation of the Sherman Act, but reached that result because of the limited trial record, without prejudice to the district court's re-

and *Anderson v. United States*, 171 U.S. 604 (1898).[2]

This case is fundamentally unlike either *Associated Press* or *Anderson*. In both of those cases, membership organizations required only membership in their own group, as a precondition to access to the exchange; and charged only the membership dues relevant to exchange activities. In this case, by contrast, access to the multiple listing service ("MLS") of Petitioner Metropolitan Multi-List ("Metro") is conditioned not solely upon joining Metro and paying Metro dues and fees, but also upon joining and paying dues to a separate organization altogether, a board of Realtors®. *Associated Press* would be analogous, for example, only if AP had required its members also to join and pay dues to a separate "National Newspaper Guild" affiliate, or comparable trade organization, as a condition of access to AP's services. Because there was no such requirement in *Associated Press*, nor in *Anderson*, those decisions do not support Petitioners' argument.

Petitioners nevertheless argue that access to Metro's services is simply a perquisite of membership in its parent, Petitioner DeKalb Board of Realtors® ("DeKalb"). But the facts demonstrate otherwise. At-

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consideration. 326 U.S. at 22-23. Hence *Associated Press* does not stand for the proposition that members-only rules are always allowed, regardless of the facts of record; even less does it approve membership restrictions which have the effect of excluding competitors of the exchange's members. *See also Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

[2] *Anderson* was decided early in the development of the Sherman Act and before present-day "effect on interstate commerce" jurisdiction, at a time when distinctions between "direct" and "indirect" effects on interstate commerce were thought very significant. The *Anderson* decision reflects that outdated analysis.

lanta area real estate professionals desiring to join a board of Realtors® are required to join not DeKalb, but the local board serving their principal place of business. Defendants' Statement of Uncontested Material Facts ("Uncontested Facts") ¶ 17. Access to Metro does not require membership in DeKalb, but may be secured by joining any of several boards of Realtors® in the metropolitan Atlanta area.[3] Furthermore, members in a board of Realtors® do not gain access to Metro without payment of Metro's separate dues and fees. Pet. at 3.

The Realtor® membership requirement makes Metro's access charges unreasonable. The Realtor® boards provide, and charge for, a host of services not necessary to the functioning of Metro as an exchange. As the Eleventh Circuit noted in this case, Petitioners' "assertion" that Realtor® membership does not entail costly additional services not provided by Metro

> may come as a surprise to the members of the Realtors® who pay several hundred dollars a year for membership and to the DeKalb Board of Realtors® official who, in an interrogatory, listed 27 services provided by the Realtors® .

(Pet., App. A, at 14a)

A review of the services listed in response to interrogatories[4] confirms that most Realtor® services

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[3] Uncontested Facts ¶ 18; Metro Rules and Regulations, Art. III §1. This home board may even lie outside Metro's service area. (R.3-35 Exh., Ebert dep. of 10/20/88 at 18) (Record citations appear in the form required by the Eleventh Circuit [volume number - document number - page number if relevant]).

[4] Three interrogatory answers are pertinent. Petitioners listed

are not necessary to Metro's functioning. Realtor® services include political action, public education and public relations, and fringe benefits such as access to insurance coverage.

By contrast, Petitioners urge only two limited functions of the Realtors® which support Metro, *i.e.* one ethical rule plus arbitration services. Respondents reasonably should pay for only those two functions, not the full range of Realtor® services.

The Fifth Circuit correctly defined what fees are reasonable; namely those germane[5] to the purposes

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27 services provided by the DeKalb Board of Realtors® ;19 services of the Georgia Association of Realtors® which benefit DeKalb's members; and 17 National Association of Realtors® services which similarly benefit DeKalb's members. (See Appendix A to this brief.) A substantial portion of each local board dues payment goes to the state and national organizations, fully half in the case of DeKalb. (R. 3-35 Exh., Ebert dep. 10/19/89, at 37, 64)

[5] In decisions outside the antitrust area, this Court has found that compulsory fees may be fractionated into the permissible and the impermissible, even when charged by a single membership organization. In *Ellis v. Railway Clerks,* 466 U.S. 435 (1984), interpreting the compulsory union membership provisions of the Railway Labor Act, this Court defined the services for which a compulsory membership group reasonably might charge as those services "germane" to the organization's purpose for existence. *Ellis* further defined those permissible charges as "direct costs" plus "expenses of activities or undertakings normally or reasonably employed to implement or effectuate [those] duties." *Id.* at 448. *See also Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 236 n.33 (1977) ("social activities" must be related to group's purpose). Although *Ellis* interpreted that statute in light of First Amendment objections, the nature of the challenge does not distinguish *Ellis* from this case. *Ellis* expressly adopted broad notions of "germaneness," rejecting a formulation which

of multiple listing services, in *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980):

> [An MLS] must be allowed to establish fee schedules which allow it to recoup its costs of operation and to maintain its viability as a going concern. . . . A sizable membership fee which bears no relation to the[se] cost factors . . . may not only create a significant barrier to new entry into the association, but may create "a strong inference that the amount has been set up as a barrier against" new applications.

Id. at 1386 (citation omitted).

Indeed, the Realtors®' own national rules confirm the principle that the only reasonable MLS fees are those attributable to MLS services or sustenance:

> "Application and entrance fees for participation in a Multiple Listing Service, owned by, operated by or affiliated with a Board of REALTORS®, in excess of the approximate cost, including the accumulation and maintenance of reasonable reserves, of developing, maintaining, or improving the organization as a going concern, is an inequitable limitation on the membership."

Interpretation No. 29 (Adopted Jan. 24, 1961). (R.3-35 Exh.)[6] Because Metro's Realtor® membership requirement imposes fees that bear no relationship to

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would have limited impermissible expenses to the purely political. *Cf. International Ass'n of Machinists v. Street*, 367 U.S. 740, 769 (1961). *Ellis* defines an organization's reasonably chargeable expenses as those relevant to its purpose for being.

[6] NAR's formal interpretations of its constitution and bylaws are binding upon the local Realtor® boards. (R.3-35 Exh., Ebert dep. 10/19/89 at 110)

Metro's functioning, the resulting charges are unreasonable as a matter of law.[7]

Since neither *Anderson* nor *Associated Press* has anything to do with unnecessary charges, nor with requiring membership in still *another* organization in order to get access to the exchange, those decisions do not conflict with the result below.

II. Petitioners Show No Conflict with Decisions of the Courts of Appeals.

A. *Pope* Is Not in Conflict With the Decision Below.

Petitioners argue that *Pope v. Mississippi Real Estate Comm'n*, 872 F.2d 127 (5th Cir. 1989), is inconsistent with the decision below on the group boycott issues. Yet *Pope*, like *Associated Press* and *Anderson*, does not address the issue of excess fees for unnecessary services provided through compulsory membership in a separate organization.

Pope arose from a unique fact setting, and therefore raised issues different from those raised in the case at bar. The Popes, husband and wife, owned a brokerage that cornered about one-half the local real estate market. The local Realtor® board had charged membership dues only to brokers. When the Popes grew dominant, the Realtors® began charging dues for each agent. The Popes gave up their Realtor® membership when agent fees began to be charged, but later sued for reinstatement based on the former fee schedule, that is, for payment of broker dues alone. As the court stated:

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[7] Alternatively, this Court's review is inappropriate because the record creates **at least** an issue of fact as to reasonableness of these charges, sufficient to resist summary judgment.

> In this case, the only membership requirement that is brought under the scrutiny of the antitrust statutes is the [Realtor®] membership fee schedule that precipitated the Popes' resignation from the board. . . . Our inquiry is limited to determining whether the present [Realtor®] fee schedule is reasonable.

872 F.2d at 130. Thus, the Fifth Circuit in *Pope* was not faced with the issue whether it was reasonable to require payment of fees for non-MLS operations. Because *Pope* concerned only the narrower issue whether Realtor® fees could be charged according to the number of agents in a brokerage, *Pope* does not conflict with the result below.[8]

Indeed, as Petitioners acknowledge, both *Pope* and the decision below were guided by the Former Fifth Circuit's opinion in *United States v. Realty Multi-List*, 629 F.2d 1351 (5th Cir. 1980). In *Realty Multi-List*, the Fifth Circuit held that MLS access limitations must (1) be justified by "competitive needs," and (2) be "reasonably necessary." 629 F.2d at 1375. Reasonable access charges are those "which allow [the MLS] to recoup its costs of operation and to maintain its viability as a going concern." *Id.* at 1386.

Petitioners embrace the *Realty Multi-List* test in some portions of their petition (*e.g.*, Pet. at 4), and in other portions criticize the test as "tantamount to *per se* condemnation of the membership require-

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[8] As if further to emphasize its limited ruling, *Pope* nowhere addresses tying claims.

ment."[9] Although Respondents would argue that such membership requirements *should* be subjected to *per se* condemnation, neither the *Realty Multi-List* case nor the decision below so held. Instead, both decisions expressly adopt a rule of reason approach, requiring that the plaintiff prove market power[10] and allowing the defense of business justification. This rule of reason approach in *Realty Multi-List* has been noted with approval in VII P. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, § 1508 at 403 (1983).

Although artfully framed in the terms of alleged conflict in the circuits, the bulk of Petitioners' argument is that the decision below is wrong and will work substantial hardship upon Metro's operations. These fact-based assertions are both unfounded and premature. The Eleventh Circuit, in remanding the case to the District Court for further proceedings, cogently reasoned:

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[9] (Pet. at 18) Petitioners' hedging in this Court is consistent with their litigation approach below; in the Court of Appeals, they did not challenge the *Realty Multi-List* test, but merely argued that it was "inapplicable." They stated, "*Realty Multi-List* simply does not apply where, as here, the Plaintiffs plainly can satisfy Metro MLS's eligibility criteria. [*Pope*] explained the inapplicability of *Realty Multi-List* when the reasonableness of an MLS's participation eligibility criteria are not at issue." (Petitioners' Eleventh Circuit brief, at 23)

[10] The existence of a factual issue as to market power serves to distinguish both *Realty Multi-List* and this case from several of the decisions cited by Petitioners. "A significant number of the cases that we have found upholding the membership requirements of multiple listing services rest at least in part upon a finding that the service lacked the requisite market power." *Realty Multi-List*, 629 F.2d at 1373 n.40 (citing several of the cases upon which Petitioners continue to rely).

> While the goal of inducing brokers to join the multilist system is a legitimate pro-competitive justification and the "no-solicitation" and arbitration rules are both reasonable and narrowly tailored to that end, this lawsuit is not questioning the validity of those two rules. The question before this Court is whether it is necessary to impose Realtor® membership requirements in order to obtain the same ends. It is clear that the Realtor® membership requirements are not narrowly tailored to the goal of inducing brokers to join the multilist system. Metro could easily impose its own "no solicitation" and arbitration rules on its members.

Pet. App. at 27a. Petitioners contend, however, that it would be difficult for Metro to adopt its own rules. There is absolutely *no* support in the record for such a counter-intuitive assertion; indeed, Petitioners have admitted Metro's capability to adopt its own internal ethical and arbitration rules.[11]

Finally, Petitioners' argument is empty as a practical matter. The ruling below leaves them with at

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[11] The Defendants agree that it is theoretically possible for Metro MLS, Inc. to adopt rules and regulations, and establish procedures for enforcing those rules and regulations, that parallel the Realtors® Code of Ethics and the duty it imposes upon Realtors® to arbitrate business disputes with other Realtors®." Defendants' Response to Plaintiffs' Statement of Uncontested Material Facts (in support of Respondents' cross-motion for partial summary judgment on the precise issue whether any justification existed for the Realtor® membership requirement at 7, ¶ 5(c)(v)). A cofounder of Metro did not recall Metro's even having ethics or arbitration provisions during a period when it was independent of DeKalb. (R.4-40 Exh., Scott dep. at 14-15)

least two options, each of which would advance the procompetitive aspects of Metro's exchange function without raising the anticompetitive threats of excess charges and exclusion from access. First, Petitioners may continue to rely upon the local boards of Realtors® to provide a non-solicitation rule and arbitration services,[12] and require non-Realtor® MLS participants to pay for those services but no other Realtor® services. Under this alternative, Petitioners need restructure nothing other than to reduce their fee schedules.

Alternatively, Metro may perform those functions itself,[13] or farm them out to non-Realtor® services providers.[14] Under either scenario, Metro members will not be required to pay for non-MLS services.

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[12] This possibility is sufficient response to Petitioners' concern for disruption of organizational "efficiency."

[13] Duplication of the Realtor® "non-solicitation" rule is as easy as putting pencil to paper. Notably, not one of the affidavits submitted by Respondents in support of the alleged necessity of Realtor® arbitration asserts that arbitration *through the Realtors®* is necessary to MLS functioning. Indeed, arbitration through the Realtors® introduces new anticompetitive potential in addition to promoting artificial interdependence. FTC Staff Reports, *The Residential Real Estate Brokerage Industry,* 16, 125 (1983) (hereinafter "FTC Report").

[14] Each of the services touted by Petitioners is provided by others in the market place, and need not be provided through compulsory Realtor® membership. Most obviously, compulsory statutory arbitration by preexisting agreement is available in Georgia even without the Realtor® structure, O.C.G.A. § 9-9-3. Petitioners could require MLS participants to subscribe to compulsory statutory arbitration, and thereby avoid setting up their own arbitration structure.

In short, the facts of record support Respondents' group boycott claim, and there is no conflict between the decision below and *Pope*. Both decisions rest upon the *Realty Multi-List* decision of the former undivided Fifth Circuit, and neither decision challenges *Realty Multi-List*.

B. There Is No Relevant Conflict in the Tying Cases.

1. There Is No Conflict With *Wells*.

Petitioners argue that the decision below somehow conflicts with decisions of other circuits in Sherman Act tying cases. Petitioners cite *Wells Real Estate v. Greater Lowell Bd. of Realtors®*, 850 F.2d 803 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988), as allegedly supporting the proposition that MLS access and Realtor® memberships constitute a single "product," thus defeating a tying claim. But *Wells* specifically refrained from finding an absence of separate products or services. Petitioners omit the language of *Wells* which pretermits determination of that very issue.[15]

Instead, *Wells* relied upon an *absence of actual competition* in the tied product market (*i.e.*, real estate boards). The court stated,

> Wells has failed to demonstrate the slightest market for membership in real estate boards that might have been affected by the defendants' alleged tying arrangement. There is no evidence that any other broker would have "purchased" membership in any other board. . . . The tying

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[15] "We need not definitively determine whether such a characterization would ever be apt, however, because we affirm the dismissal for the reasons stated above" 850 F.2d at 815. Those reasons are discussed next in the text.

> claim must fail absent any proof of anti-competitive effects in the market for the tied product.

850 F.2d 815.[16] The instant case is quite different. Unlike Lowell with its one professional organization, Atlanta has more than one. Respondent Empire, a direct competitor of the local Realtor® boards, offers Atlantans an alternative professional membership structure. In Atlanta, real estate professionals perceive joining Empire as a viable alternative to joining a Realtor® board.[17] In this case, the *Wells* court would have no difficulty finding that the professional association market has been affected by Petitioners' tying arrangement.

To the extent dicta in *Wells* found no separate products, its analysis is simply erroneous. See *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2 (1984). Separate products are created for tying purposes by "a sale involving two independent transactions, separately priced and purchased *from the buyer's perspective*." *Id.* at 20 (emphasis supplied).

> [W]hether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items. . . . .

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[16] See also Pet. at 20; *O'Riordan v. Long Island Bd. of Realtors®, Inc.*, 707 F.Supp. 111, 116 (E.D.N.Y. 1988) ("plaintiff has made no showing that there was any sort of market in boards of real estate dealers.")

[17] (Pet. at 19a) A valid tying claim is stated where there is active *or potential* competition in the tied product market. *Rosebrough Monument Co. v. Memorial Park Cem.*, 666 F.2d 1130, 1142 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982).

Id. at 19 (citations omitted). The separateness of products is an issue of fact, for the trier of fact. *Id.* at 23.

Plaintiffs have demonstrated ample evidence of two separate "products".

> In the case at hand, all of the relevant evidence submitted on the question of whether there are two separate product markets indicates that the market for professional affiliation is separate from the market for multilist services. For example, there is evidence that the bill for joining the Realtors® is separate from Metro's bill; that a broker can join the Realtors® and choose not to use the multilist service; that, within Atlanta, there are at least two professional groups competing for members; that some local Realtor® groups offer multilist services and some do not; that Metro was once an independent organization that was later purchased by the Realtors® who imposed the Realtor® membership requirement; and that in other markets, multi-list services are independent of professional membership. . . .

(Pet. App. at 14a-15a, decision of the Eleventh Circuit)[18] All of this evidence, and more,[19] demonstrates

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[18] The evidence also reflects members or would-be members of Metro who do not wish to be Realtors®. (Pet.App. at 19a)

[19] The Realtors® themselves have made plain that they consider Realtor® membership and MLS access to be separate "products."

> "A requirement to participate in a Multiple Listing Service in order to gain and maintain REAL-

precisely that there is consumer demand for separate real estate professional association memberships. *See Jefferson Parish.*

Even if Petitioners' functional relation test were the law of the land, the record casts severe doubt on Petitioners' assertions. The mere existence of multiple Realtor® boards in the Atlanta area, any one of which will satisfy Metro's requirement, suggests that there is no one-to-one tie between the product offered by Metro and the product offered by DeKalb. The continued functioning of First Multiple Listing Service in part of the Atlanta market as a non-Realtor® service (Undisputed Facts ¶ 84), and of other non-Realtor® MLS's in other markets, belies Defendants' sweeping assertion that Metro needs a tie-in with the Realtors® .[20] Independent listing service "products" stand on their own, without regard to the Realtors®.

> TOR® membership is an inequitable limitation on its membership."
>
> When a Multiple Listing Service is available, is well operated and properly organized, it is the duty of the REALTOR® to consider thoroughly whether he can serve the best interests of his clients by participating in it. The decision, however, must be his own. As a REALTOR®, it is possible for him to conduct his business in an ethical and efficient manner without participating in a Multiple Listing Service. Therefore, his participation must not be a requirement of REALTOR® membership.

National Association of Realtors Official Interpretation No. 1 (Adopted Nov. 15, 1960); see also Interpretation No. 2 (Adopted January 24, 1961) (local board initiation fee must be separate from any MLS fee).

[20] Even the Realtors® have occasionally been realistic enough

2. There Is No Conflict With *Waste Mgt.* or *Syufy*.

Contrary to Petitioners' assertions, there is no conflict between the Eleventh Circuit's decision and either *United States v. Waste Mgt., Inc.*, 743 F.2d 976 (2d Cir. 1984); or *United States v. Syufy Enters.*, 903 F.2d 659 (9th Cir. 1990), on the issue of good will as a barrier to market entry. Petitioners artificially attempt to create such a conflict by mischaracterizing the decision below. Petitioners assert without basis that the Eleventh Circuit held "that proof that Metro had engendered 'good will' was sufficient as a matter of law to establish a barrier to entry." Pet. at 21.

This assertion is belied by the opinion below, at the very page to which Petitioners refer:

> In short, there is a **material issue of fact** as to whether the defendants have the necessary market power. There is evidence in the record suggesting that there are few realistic substitutes, that there are entry barriers to the market, and that Metro may not have any competitors.

Pet. App. at 18a (emphasis supplied). Thus the ruling below is not a ruling "as a matter of law."

Equally important, the Eleventh Circuit did not misapprehend the forcing power requirement. That

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to recognize this proposition. A Realtor® -affiliated MLS in Oregon settled an antitrust suit on terms that permitted applicants to join without becoming Realtors® as well. *United States v. Multiple Listing Service*, No. CV-72-68 (D.Ore.), cited in *O'Riordan v. Long Island Bd. of Realtors, Inc.*, 707 F.Supp. 111, 116 (E.D.N.Y. 1988). See also *People v. National Ass'n of Realtors*, 120 Cal.App.3d 459, 127 Cal.Rptr. 728 (1981) (striking down Realtor® membership requirement as a matter of law).

court correctly noted that forcing power requires a showing of entry barriers to the tying product market, and found an issue of fact presented on this record as to the existence of such entry barriers. Pet. App. at 18a.

That finding is well supported. The record substantiates that in order to compete effectively with Metro, a new multiple listing service would have to offer the same measure of participation by area brokers, so that the service would carry comparable numbers of property listings, and would interest comparable numbers of brokers assisting buyers. (R.4-40 Exh., Venable Aff. at ¶ 14) Thus, to compete effectively with Metro in its market, it is not sufficient for a new multiple listing service simply to offer comparable facilities in terms of computer terminals, lock boxes, "sold books" and other tangible items. (*Id.* at ¶ 13) In addition, it must generate a critical mass of listings with which to compete. Acquiring such a critical mass is an almost impossible task for a prospective entrant into the same geographic market as Metro, however, because of the pre-existing loyalties of the present members of Metro, and the near impossibility of persuading the membership generally to abandon Metro and its critical mass of listings, for an upstart without such a critical mass. (*Id.* at ¶ 15)

These are not just theoretical concepts. These barriers to entry have precluded at least one effort to compete with Metro. In 1989, an entrepreneurial broker committed to the substantial capital outlay which was required to start up a competing MLS. *Id.* at ¶ 18. He proposed to offer MLS services better and more cheaply than did Metro, in southside metropolitan Atlanta. (*Id.* at ¶¶ 16, 17) He found, however,

that the size, bargaining strength and tactical maneuvering of Metro and its associated Realtors® were prohibitive barriers to entry. (*Id.* at ¶¶ 21, 23)

The record thus provides material evidence that Petitioners' facility is not readily duplicable. The facts of record are further supported by analysis of the market function of MLS's:

> One may expect that, in the case of most multiple listing services, the service will strive toward market dominance. As we have shown, the primary incentive to form a multiple listing service comes from the drive to overcome the market imperfections inherent in the real estate industry. These imperfections are overcome in direct proportion to the service's ability to attract sellers and brokers to bring their listings to it. *Thus, at least in theoretical terms, the larger the service, the more effectively it may operate.* And, of course, the more the service strives toward this goal, the greater the danger of anticompetitive exclusions becomes.

United States v. Realty Multi-List, 629 F.2d 1351, 1373 n.42 (5th Cir. 1980) (emphasis supplied). Conversely, "the formation of a separate competing service can only serve to perpetuate some degree of market imperfection." *Id.* at 1374 n.44. As a result, "MLS's rarely compete with each other." FTC Report at 118. Petitioners' representative conceded that Metro's success is measured "by the number of Realtors® that want our service." (R.3-35 Exh., Ebert depo., 10/19/89, at 47) See also Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 Colum. L.Rev. 1326, 1357 (1970).

The Court of Appeals used the term "good will" as short hand, not inclusive of all entry barriers shown on this record. The single most important fact relevant to entry barriers is the "critical mass" of customers which a new MLS must accumulate to start business, quite apart from the physical needs of operation. This market is in stark contrast to those in both *Waste Mgt.*, 743 F.2d at 982 ("A person wanting to start in the trash collection business can acquire a truck [and] a few containers. . . ."); and *Syufy*, 903 F.2d at 667 ("rough-and-tumble industry, marked by easy market access. . . .").

Because the Eleventh Circuit treated market power, including barriers to entry, as a factual issue—not an issue of law, as Petitioners insist—and because the record contains ample factual support, there is no conflict between the decision below and those of the Second and Ninth Circuits.

C. There Is No Principled Appellate Conflict.

Finally, Petitioners argue for a less direct conflict in principle among the courts of appeals. Petitioners argue that satisfaction of the rule of reason inherently precludes review of the same conduct under the *per se* tying rule; and impliedly, that this Court should grant review to establish that principle. But Petitioners provide no relevant citation to a court of appeals decision so holding, and thus establish no conflict. Furthermore, recently this Court has already established that conduct which may survive inquiry under the rule of reason may nevertheless be tested under a *per se* approach. See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 436 n.19 (1990) (even if group boycott authorized under rule of rea-

son, same conduct was forbidden by separate *per se* prohibition against price fixing).

Split-level analysis makes special sense here because the two Sherman Act claims apply to different harms. The group boycott claim looks solely at the market for multiple listing services. Resulting exclusion harms both excluded brokers, who lack access to a critical market tool; and consumers, who have access to fewer participating brokers, and thus may pay more. *United States v. Realty Multi-List*, 629 F.2d 1351, 1370-71 (5th Cir. 1980).[21]

But Petitioners have not simply established internal access requirements for Metro. They also have required that all applicants join a separate trade association, as a condition of access to their multiple listing system.[22] That conduct directly injures competition in the separate market for professional membership associations. *Per se* tying analysis is appropriate for such harm to a separate competitive

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[21] See also L. Sullivan, Antitrust, at 255-956 (1977); Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 Colum. L. Rev. 1326, 1330-31, 1341-43 (1970). Hence Petitioners' assertion that their Realtor® membership requirement is solely about "efficiency," with no impact on consumer welfare, is without foundation.

[22] Petitioners hint that they should not be subject to *per se* analysis on the sole ground they are a membership organization. But Metro is not a professional membership organization. In any event, trade associations are fraught with potential for anticompetitive conduct as well as occasional procompetitive benefits. Furthermore, when trade groups attempt to manipulate markets other than their own membership by methods subject to *per se* attack, they clearly are subject to *per se* treatment. See *FTC v. Superior Court Trial Lawyers Ass'n, supra; United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 488-89 (1950).

market. *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2 (1984).[23]

III. Petitioners Show No Novel, Important Question of Law Which This Court Should Settle.

Petitioners have also asserted other miscellaneous arguments to support this Court's review but, none with any merit:

Petitioners contend that this case should be held for the Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, No. 90-1029. The issue in *Kodak*, however, is whether a tying violation can ever occur in a single brand "aftermarket," where a defendant original equipment manufacturer lacks market power in the original equipment market. In this case, there is no such "aftermarket" issue presented, and whether Petitioners have the requisite "market power" is an unresolved factual issue for trial. The Court's decision in *Kodak* will not have any impact on the issues raised in the Petition.

Petitioners also argue that the "practical impact" of the ruling below is sufficient reason to grant review, asserting that "virtually all [Realtor®-affiliated] multilist services" will be affected. (Pet. at 25) The

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[23] Moreover, tying claims are unique among *per se* claims in the burdens imposed upon plaintiffs, thus the scope of freedom left to defendants. *Per se* tying requires market power. *Jefferson Parish, supra.* Finally, this case presents no factual grounds for reconsidering the *per se* approach to tying claims. As the Eleventh Circuit demonstrated in its separate discussion of the rule of reason, Petitioners show no justification for the Realtor® membership requirement as a matter of law. Nor have Petitioners presented any compelling reason why the *per se* standard, which this Court has used for decades, should be abandoned.

Court of Appeals, however, very carefully treated the predominant issues as factual matters, recognizing the summary judgment posture of the case. Most obviously, neither Metro nor any other Realtor®-affiliated MLS will be affected by the Eleventh Circuit ruling unless it possesses market power. If such a group does possess market power, then the MLS *should* change its practices, given the competitive harms outlined in *Realty Multi-List*.

Any change in practices does not require radical restructuring, despite Petitioners' contentions. Petitioners may choose between maintaining their current structure and allocating a small portion of fees for Realtor® services to non-Realtor® participants in Metro; or providing relevant services directly through Metro or through other organizations.

The experience in California and at least one local Realtor® board in Oregon shows that MLS's can and do survive the demise of their Realtor® membership requirements, and continue to provide valuable services to their exchange participants at a cost which reflects their services and only their services.[24] The experience of non-Realtor® MLS's also shows the same potential.[25] Petitioners' cries of "practical impact" do not justify review.[26]

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[24] See, *e.g.*, FTC Report at 126 (a California MLS relies upon American Arbitration Association in disputes with non-Realtors®).

[25] Undisputed Facts ¶ 84 (independent MLS without Realtor® membership requirement).

[26] Petitioners also suggest that the Eleventh Circuit's ruling somehow does violence to the Justice Department's antitrust enforcement policy, yet provide no written policy statement from

IV. Supreme Court Review Of This Action Is Premature.

This case is not ripe for review. The Eleventh Circuit remanded to the district court. (App. at 30a) "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

The effect of the Eleventh Circuit's ruling was merely to reverse summary judgment, leaving this case subject to trial on the factual issues. The need for this Court's review may be obviated by a trial. Certiorari is premature.

V. CONCLUSION

Because Petitioners have shown no relevant conflict between the result below and decisions of this Court or the courts of appeals; because Petitioners have not shown any other significant ground for certiorari; and because certiorari is premature in any event; the writ should be denied.

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either the Justice Department or the FTC. Petitioners cite no recent instance of express ratification of a Realtor® membership requirement for MLS access. Indeed, in *United States v. Multiple Listing Service*, No. cv-72-68 (D.Ore.), cited in *O'Riordan, supra*, 707 F.Supp. at 116; the consent decree required abandonment of just such a requirement.

Respectfully submitted,

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Dated February 10, 1992

APPENDIX

Petitioners' Answers to Interrogatories:

16.

The benefits and services provided by the DeKalb Board to its members include:

1. Public recognition and use of the REALTOR® trademark.
2. Education—at least six programs are provided annually. For example, Equal Opportunity, Contract Writing, motivational type programs, etc.
3. Legislation—reviews, and keeps members informed of all legislation affecting real estate, and consults with elected officials regarding matters affecting real estate.
4. REALTORS® political action—supports political candidates who understand the free enterprise system and concerns of REALTORS® and property owners.
5. Monthly business—conducts monthly meetings, except during June, July and August, to inform members of critical issues within the industry and information relative to day-to-day real estate activities.
6. Provides an extensive real estate library for its members which includes sales information, plat books, audio-visual materials (films, cassettes, tapes), floodplain maps, etc.
7. Publishes monthly trade magazine.
8. Awards recognition for outstanding individual accomplishments, including a Million Dollar Club for members who have excelled in the industry by selling more than a million dollars worth of real estate.
9. Promotes membership in the DeKalb Young Council of REALTORS® .
10. Young Council of REALTORS® —a committee of the Board organized for the purpose of providing

a training ground for young REALTORS® ,to develop and expand capabilities of its members to assume leadership roles. This group has educational programs, civic projects, and assists the DeKalb Board in its activities.

11. DeKalb Chapter of Women's Council—designs educational programs to assist members in their career, encourages leadership roles, builds a support system nationally, encourages business referrals, encourages active participation in the local, state and national associations, and promotes the Code of Ethics.
12. Public Relations—promotes annual American Home Week to inform the general public of the REALTOR® family which is constantly working within the community for the free enterprise system, and private property rights.
13. Provides the opportunity to participate in the Metro Listing Service, a wholly owned subsidiary of the DeKalb Board of REALTORS® .
14. Provides social functions to enhance camaraderie and provides networking opportunities which enforces the good working relationship between members.
15. Adopt-A-School Program—enforces the relationship between the Realtor® and the community, improving the REALTOR® image for all members.
16. Provides annual Broker Workshop to better educate the Broker who will, in turn, educate and assist the agents associated with the Broker's firm.
17. Commercial Counsel Listing Exchange provides a method of disseminating information of a commercial nature to other commercial brokers.
18. Equal Opportunity—works closely with the CHRB to provide information and education on the civil rights laws; signing of the Affirmative Marketing

Agreement; polices possible violations in the area of Fair Housing and Civil Rights.

19. Provides HUD posters and ad[] slicks for equal opportunity in housing advertising for broker offices.
20. Conducts a monthly four and a half hour orientation program for new applicants.
21. Professional Standards—provides a means of arbitrating disputes in lieu of litigation, thus saving court costs and attorney's fees; promotes Code of Ethics to which every member must adhere; enforces its Code of Ethics among the members.
22. Realtor® MarketPlace—a wholly-owned subsidiary of the DeKalb Board of REALTORS® .This retail store provides one-stop shopping and carries items needed and most commonly used by real estate agents for their day-to-day activities, including signs, daily planners, pens, cameras, film, books, brochures, etc.
23. Keeps members informed on local sign ordinances.
24. Provides an opportunity for its members to participate at their trade association through its 33 committees.
25. Provides members with information of services provided by GAR and NAR.
26. Works closely with the Chamber of Commerce and DeKalb Developers.
27. Provides members with a DeKalb Board Orientation Packet.

17.

The Georgia Association of REALTORS® serves 159 counties, 54 Boards of REALTORS® ,and 22,000 individual members. As a member of the Georgia Association of REALTORS® , the DeKalb Board of REALTORS® members benefit from the following services by GAR:

1. Legislative—GAR employs a full-time lobbyist to monitor legislation of concern to homeowners, prospective purchasers and the industry at large. GAR maintains a high profile in the legislative process.
2. GAR has access to legal information throughout the state to assist its members with legal matters, including citation to applicable legislation.
3. GAR works closely with the Georgia Real Estate Commission which polices the integrity of the industry in dealing with the public.
4. GAR provides Georgia real estate manuals, books on contract stipulations, etc., at a much reduced publication cost to its members. A new Georgia real estate manual is provided to every Realtor® broker in Georgia free of charge.
5. GAR provides its own credit cards at a discount for use by its members.
6. GAR provides insurance benefits with group rates on major medical, errors and omissions coverage, income protection, Medicare supplement, accidental death and disability coverage, and term life insurance.
7. GAR provides education throughout the state with Outreach courses provided to local Boards.
8. GAR provides G.R.I. designation in Georgia REALTORS® Institute.
9. GAR provides an extensive library with materials for its members.
10. GAR provides a Speakers Bureau for Board programs.
11. GAR conducts two state meetings per year to bring together leadership in its membership to make decisions on policies and planning goals to enhance networking throughout the state.
12. The good public image of REALTORS® across the State of Georgia.

13. GAR publishes a monthly periodical for its members.
14. GAR provides a scholarship foundation which provides scholarships to members to enable them to participate in courses for professional designations.
15. GAR provides various brochures for agents' use on subjects such as safety, advertising, and utilization of library facilities.
16. GAR provides a forum at conventions for education and sharing of information.
17. The Professional Standards Committee conducts training programs for the local Board Professional Standards Committee members.
18. Membership opportunity in the GAR Young Council of Realtors® Committee and the Georgia Chapter of Women's Council.
19. GAR conducts annual Executive Officer Seminars to educate the local Board Executive Officers and elected Secretaries.

18.

NAR represents 54 State associations of REALTORS® which include the fifty states, District of Columbia, Guam, Puerto Rico and the Virgin Islands, as well as approximately 1,854 local Boards and approximately 800,000 members. NAR provides an office in Washington, D.C. (in addition to its headquarters in Chicago, Illinois) for the purpose of legislative activities and lobbying for home ownership rights. Members of the DeKalb Board of REALTORS® receive or benefit from the following activities and services by NAR:

1. NAR provides the largest real estate library in the world.
2. NAR provides a product service catalog containing extensive real estate material to be used by

REALTORS® in their day-to-day activities, such as brochures, farming tools, public relation aids, etc.

3. NAR provides material to state and local Boards for community projects and public relation materials.
4. NAR provides extensive training materials in the way of handbooks and workbooks for Board leadership, committee chairmen and executive officers, such as budgeting and financial control handbooks, membership recruitment and retention kits, community service project guides, and affirmative marketing handbooks.
5. NAR provides equal opportunity training manuals and administrative policy manuals.
6. NAR provides educational programs which permit members to attain professional designations such as MAI, CCIM, CPM, CRB, CRS, LTG, etc.
7. NAR publishes a monthly industry magazine and a bi-weekly newspaper informing its members of current issues relating to real estate.
8. NAR works with HUD in the area of fair housing and civil rights, and develops procedures contained in the affirmative marketing agreement.
9. NAR informs its members regarding tax issues and FTC regulations.
10. NAR conducts training sessions on the Code of Ethics for state and local professional standards chairmen.
11. NAR provides a one-week training session for Board Executive Officers.
12. NAR conducts three national membership meetings per year which allow grass roots input and participation in NAR. Trade shows are held at each national meeting to inform the REALTORS® of services and products available.
13. NAR engages national speakers for educational purposes to benefit its members.

14. NAR promotes and safeguards the REALTOR® membership logo and permits use of the REALTOR® trademark by members.
15. NAR sets guidelines and policies for multiple listing services operated by the local Boards of REALTORS® .
16. NAR is involved with international policies regarding real estate practices, and provides an Economics and Research Department for use by REALTOR® members.
17. NAR provides consultants, computer hardware and computer software for a computerization of local and state offices.

No. 91-1108

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DEKALB BOARD OF REALTORS, INC., and
METROPOLITAN MULTI-LIST, INC.,
Petitioners,

v.

FLETCHER L. THOMPSON and
EMPIRE REAL ESTATE BOARD, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONERS

1. The fundamental question presented here—whether a board of realtors may require membership in the board as a condition for gaining access to its multilist service—has been the subject of federal antitrust review and private litigation for 20 years. The petition demonstrates that every federal and state court (save California) to have considered the issue has ruled that local boards may require membership so long as membership requirements are reasonable and non-discriminatory. See Pet. 13-16. The decision below squarely conflicts with these decisions. Of the many Realtor cases discussed in the petition, respondents address only one—*Pope* v. *Mississippi Real Estate Comm'n*, 872 F.2d 127, 130-31 (5th Cir. 1989)—and offer no persuasive basis for distinguishing that case. Respondents also ignore the fact that, after more than a

decade of intensive scrutiny by the United States Department of Justice resulting in significant revisions to multilist policies, the government has never required a single board to abandon its membership requirement. Pet. 17. These facts alone provide compelling reasons to grant the petition.

Apart from attempting to distinguish some of the cases cited by petitioners, respondents' only other proffered ground for denying the petition is the interlocutory posture of the case. But that is no basis for denying review in this case. First, as respondents themselves expressly concede, the decision below, if left undisturbed, will have an immediate national impact. Referring to "any other Realtor-affiliated MLS," respondents admit that, under the decision below, "[i]f such a group does possess market power, then the MLS *should* change its practices . . . ." Opp. 21. There is thus no dispute that the Eleventh Circuit's decision potentially affects every board in the country that operates an MLS. See Pet. 25. The *amicus* briefs submitted by the National Association of Realtors (NAR) and by the American Society of Association Executives (ASAE) and five prominent national professional and business associations underscore the need for immediate review of the conflict created by the decision below.

Second, this is not a case where the disputed facts are material to the legal question before this Court. The legal issue here is whether an association whose membership requirements are reasonable and non-discriminatory violates the Sherman Act if it offers its services only to its members. As the petition demonstrates, the facts needed to resolve that question are undisputed. *Id.* at 2-3 & n.1. Indeed, a trial on the only disputed issue mentioned by the respondents—whether the multilist service has market power—would at best be a waste of judicial and private resources, because the definition of market power imposed by the Eleventh Circuit is itself erroneous. *Id.* at 21-23.

2. The grounds for review that respondents have either ignored or conceded therefore are themselves sufficient for granting the petition. Respondents make several additional points, most of which attempt to distinguish some of the cases cited in the petition. None of them have merit.

First, respondents attempt to distinguish this case from *Associated Press* v. *United States*, 326 U.S. 1 (1945), and *Anderson* v. *United States*, 171 U.S. 604 (1898), because in those cases, "organizations required only membership in their own group" whereas here plaintiffs are required to join "a separate organization altogether." Opp. 2.[1] Respondents' argument turns on the fact that the DeKalb Board offers its multilist service through a wholly owned subsidiary. *Id.* But petitioners' corporate structure, while significant for tax purposes, has no legal significance for the antitrust question presented here. Indeed, in one of the cases that squarely conflicts with the decision below, the court expressly noted but ascribed no relevance to the fact that the multilist service was "set up" for tax purposes "as a wholly owned subsidiary" of the local board. *O'Riordan* v. *Long Island Bd. of Realtors, Inc.*, 707 F. Supp. 111, 113 (E.D.N.Y. 1988).

The reason that this is a distinction without a difference is plain. Respondents' claims would not be affected one bit if, tomorrow, the DeKalb Board decided to offer the multilist service directly rather than through a wholly owned subsidiary. Respondents would still have to join the DeKalb Board in order to gain access to the multilist service, and thus would still have to pay dues to support

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[1] Respondents also suggest that *Anderson* is distinguishable because it was decided prior to the Court's adoption of its current understanding of interstate commerce. But the Court's decision turned not on an outdated conception of interstate commerce but on its analysis that an association's enforcement of reasonable membership requirements could not have any harmful effect on commerce, however defined. *See* 171 U.S. 604, 616-20 (1898).

the various non-multilist services that they claim they do not want. See Opp. 3-5. In short, plaintiffs are in the same position as a competing news organization who wanted access to the news AP distributed but not to other benefits of AP membership, or a livestock trader who wanted access to the exchange but did not want to be a member of the traders' association.

The irrelevance of petitioners' corporate structure to the antitrust question presented is underscored by the *amicus* brief filed by the ASAE, *et al.* That brief demonstrates that the holding below is not limited to cases involving wholly owned subsidiaries and conflicts with other association cases outside the real estate context. See ASAE *Amicus* brief at 9-10 (demonstrating conflict with *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 188 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973), and *Ralph C. Wilson Indus., Inc.* v. *Chronicle Broadcasting Co.*, 794 F.2d 1359, 1366 (9th Cir. 1986)).

Second, respondents argue that this case is distinguishable from the Fifth Circuit's decision in *Pope*, 872 F.2d at 130-31, because there the Fifth Circuit's inquiry was "'limited to determining whether the present [Realtor] fee schedule is reasonable.'" Opp. 7 (quoting 872 F.2d at 130). But it was only because the Fifth Circuit followed the *Associated Press* test—which asks whether the membership requirements are reasonable and nondiscriminatory—that the Fifth Circuit could then reach the dispositive, narrower question of whether the fees required for membership were in fact "reasonable." 872 F.2d at 130. See *Pope* v. *Mississippi Real Estate Comm'n*, 695 F. Supp. 253, 269-72 (N.D. Miss. 1988) (three pages of analysis addressing "critical legal question . . . whether requiring board membership to participate in MLS satisfied the 'rule of reason'"); 872 F.2d at 130 (threshold finding that membership requirement itself not necessarily unlawful because "[i]f properly admin-

istered, membership requirements serve pro-competitive purposes").

Thus, if this case had arisen in the Fifth Circuit, the only question before the court would have been whether the membership requirements were reasonable and non-discriminatory. Given the undisputed facts that (1) annual board membership dues are $275.00, and (2) at all times relevant to this lawsuit, the board has accepted every application for Realtor membership submitted to it, the district court correctly granted summary judgment to petitioners. See Pet. 2-3 & n.1., 7 n.8. The conflict between the contrary decision of the court of appeals and *Pope* is thus irreconcilable.

Third, respondents argue that the decision below imposes no burden on petitioners because it "leaves them with at least two options" that are less restrictive than the current system. Opp. 9-10. The argument misses the fundamental point of the petition. The question is not whether less restrictive alternatives exist. Petitioners have conceded that here, as in almost any case, plaintiffs and judges can point to alternatives that are "less restrictive." The question instead is whether the standard for determining whether an association's membership rules violate the Sherman Act is a least-restrictive-means test. See Pet. 18-19. Respondents do not dispute that three circuits have expressly rejected that test in rule-of-reason cases, see *id.*, which is reason enough to grant the petition.

Fourth, on the tying claim, respondents concede that the analysis in *Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988), conflicts with the decision below, but argue that *Wells*' "analysis is simply erroneous" in light of this Court's decision in *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2 (1984). Opp. 12-13. The allegation that the First Circuit incorrectly applied *Jefferson Parish* to the question whether associa-

tions engage in tying when they offer services only to members, however, simply underscores the need for review on the merits. That need is further underscored by the fact, which respondents simply ignore, that one district court outside the First Circuit has expressly relied on the First Circuit's allegedly erroneous analysis in reaching a result that squarely conflicts with the result here. See Pet. 20.

Respondents next argue that "[t]he mere existence of multiple Realtor boards in the Atlanta area, any one of which will satisfy Metro's requirement, suggests that there is no one-to-one tie between the product offered by Metro and the product offered by DeKalb." Opp. 14. But this observation itself casts doubt on the validity of the tying analysis below. It is a strange tie indeed where the defendant is not always the seller of the tied product. The fact that board membership serves procompetitive rather than pecuniary ends is further underscored by the fact that 35% of multilist services *not affiliated* with NAR nevertheless require membership in a Board as a precondition to multilist service. NAR *Amicus* brief at 7-8. At a minimum then, respondents and petitioners agree that this is *not* the sort of arrangement that this Court or any court has previously condemned as a tie-in.

Fifth, respondents fail to distinguish the conflict between the Eleventh Circuit and the Second and Ninth Circuits on the question whether good will can ever be an "entry barrier" sufficient to demonstrate market power. Respondents contend that the decision below did no more than hold that " 'there is a material question of fact as to whether the defendants have the necessary market power.' " Opp. 15 (quoting Pet. App. 18a) (emphasis omitted). But in so holding, the court of appeals reversed the district court's holding that there was no genuine dispute over market power because there were no entry barriers. To reverse that judgment, the court of appeals held, as a matter of law, that proof of "an in-

surmountable amount of good will" is sufficient to establish entry barriers and thus market power. Pet. App. 18a. Respondents' subsequent explanation of the good will argument, that "pre-existing loyalties of the present members of Metro, and the near impossibility of persuading the membership generally to abandon Metro and its critical mass of listings," (Opp. 16) confirms that respondents' argument here is precisely the same argument that was rejected by the Second and Ninth Circuits. See *United States* v. *Waste Management, Inc.*, 743 F.2d 976, 984 (2d Cir. 1984); *United States* v. *Syufy Enters.*, 903 F.2d 659, 669 (9th Cir. 1990).

Finally, respondents defend their argument that a membership requirement that satisfies the rule of reason under *Associated Press* may nevertheless constitute a tie-in. The tension inherent in that argument is not worthy of review, they claim, because "[p]etitioners provide no relevant citation to a court of appeals' decision so holding." Opp. 18. That objection misses the point: Both this Court and one court of appeals have expressly recognized that it is the nature of the alleged restraint—and not the label—that matters for purposes of Section 1. Pet. 23. Tying analysis has long been a source of confusion in antitrust jurisprudence,[2] and the need to ensure that tying analysis is consistent with the rest of the Court's Section 1 jurisprudence has been recognized by individual members of this Court as well as by various courts of appeals. See *id.* at 24.

3. In sum, the petition demonstrates that the decision below conflicts with numerous lower court and state court decisions as well as with decisions of this Court. The brief in opposition does not persuasively distinguish these conflicts, and it confirms that the decision is of immediate importance to boards and associations throughout the

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[2] *Compare, e.g., Fortner Enters., Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969) *with United States Steel Corp.* v. *Fortner Enters., Inc.*, 429 U.S. 610 (1977).

country. The antitrust question presented is therefore one of national importance that this Court should resolve.

CONCLUSION

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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February 13, 1992

No. 91-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DEKALB BOARD OF REALTORS, INC., and
METROPOLITAN MULTI-LIST, INC.,
Petitioners,

v.

FLETCHER L. THOMPSON and
EMPIRE REAL ESTATE BOARD, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONERS' REPLY TO THE BRIEF OF THE UNITED STATES

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PETITIONERS' REPLY TO THE BRIEF OF THE UNITED STATES

Most of the points made in the Solicitor General's brief are reasons for this Court to grant review. The Solicitor General does not defend the Eleventh Circuit's ruling that association membership requirements are lawful only if the association (1) lacks market power and (2) can run the gauntlet of a five-part test for *per se* tying. To the contrary, the Solicitor General sets forth an entirely different standard (U.S. Br. 7-11), stating, *inter alia*, that "the antitrust laws seldom should prevent a trade association from deciding for itself on the particular package of services and benefits it wishes to extend to members" (*id.* 10), and that "per se tying analysis is rarely applicable to a package of benefits and services offered by a trade association to its members." *Id.* at 15. The Solicitor General is also "troubled" by the Eleventh Circuit's failure "to acknowledge the significance of potential procompetitive justifications" for the membership requirement. *Id.* at 7. And he recognizes that the decision below may "encourage (or prolong) unwarranted antitrust challenges to association membership requirements." *Id.*

Despite these concerns, the Solicitor General recommends against the Court's review because he finds "no square conflict with a decision of this Court or a court of appeals." *Id.* The assertion that there is no conflict, however, is wrong. The decision below conflicts with *Pope* v. *Mississippi Real Estate Comm'n*, 872 F.2d 127 (5th Cir. 1989), and *Associated Press* v. *United States*, 326 U.S. 1 (1945), and review should be granted to resolve those conflicts. Moreover, review should be granted because of the national importance of establishing a single, definitive legal standard for trade and professional associations and avoiding the serious repercussions to local Boards of Realtors of allowing the decision below to stand.

1. The government errs in alleging no square conflict. The government claims that "[t]he cases on which petitioners rely do not go so far as to hold that such a [mem-

bership] requirement is per se legal if membership is open to any real estate broker and the dues accurately reflect the costs of the full range of services and benefits provided to members." U.S. Br. 11. But this is precisely what the Fifth Circuit held in *Pope* v. *Mississippi Real Estate Comm'n*, 872 F.2d 127 (5th Cir. 1989).

Like the plaintiffs here, the plaintiffs in *Pope* "were not permitted to participate in the MLS because they were not board members." 872 F.2d at 130. The Fifth Circuit began its analysis by noting that the "exclusion of non-members from the MLS . . . is examined under the rule of reason." *Id.* The court then analyzed *not* whether the local board and MLS had market power (as the Eleventh Circuit did), but whether the board's membership requirements were reasonable, that is, cost-based and non-discriminatory. Contrary to the Solicitor General's argument, the court in *Pope* expressly held that cost-based fees are reasonable:

> *Membership dues reasonably related to expenses and to recouping the costs of the MLS are reasonable.*
>
> . . . .
>
> [Conversely,] [t]o collect *more than the cost* of the service creates a barrier to the admittance of any new member and is without competitive justification.

Id. (emphasis added). The court then affirmed the grant of summary judgment for the board as to reasonableness because in *Pope*, as here, the plaintiffs "do not argue that the board is collecting more total fees than is reasonably necessary to run the operation of the MLS and the other essential operations of the board." *Id.* The court also examined the Popes' claim that the Board's membership fee schedule was discriminatory because it "forced [them] to carry the majority of the board's financial burden." *Id.* The court rejected that claim as well, finding the Board's apportionment scheme to be fair. *Id.* at 130-31.[1]

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[1] The district court's "extensive opinion" (872 F.2d at 129) in *Pope* further confirms that the issues there were identical to those here. *Pope* v. *Mississippi Real Estate Comm'n*, 695 F. Supp. 253 (N.D. Miss. 1988). The district court examined both "whether

The decision below conflicts with *Pope*. Plaintiffs' central claim in both cases—that the anttirust laws prohibit a board from denying non-members access to its MLS—is identical. In *Pope*, the Fifth Circuit affirmed summary judgment because the Board's membership fees were cost-based and therefore reasonable, and because the apportionment of fees among members was nondiscriminatory. In this case, by contrast, the Eleventh Circuit reversed summary judgment. It ignored the question whether the Board's membership requirements were reasonable and non-discriminatory, and held instead that, at least absent unspecified procompetitive justifications, membership requirements violate the Sherman Act if the Board has market power. Pet. App. 28a. These are squarely conflicting holdings that warrant resolution by this Court.

The decision below also conflicts with *Associated Press* v. *United States*, 326 U.S. 1 (1945). The Solicitor General acknowledges that, in *Associated Press*, this Court rejected the government's argument that associations may not limit competitively valuable services to members. U.S. Br. 12. But he argues that this Court's willingness to let the government reopen proceedings if new events so required is sufficient to distinguish that case. *Id.* It is not sufficient, however. If the Eleventh Circuit's rule were correct, this Court could not have approved the consent decree in *Associated Press*, because the market power of the Associated Press was evident on the record before it. See 326 U.S. at 12-13. *Associated Press* does not stand only for the government's right to reopen enforce-

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membership on the Board of Realtors is available to the Popes on a non-discriminatory basis" and "whether board membership may be required for participation in the MLS under the antitrust laws." *Id.* at 266, 269. "The critical legal question is whether requiring board membership to participate in MLS satisfied the 'rule of reason' standard or is a violation of the antitrust laws." *Id.* at 269; *see id.* at 270 (same). Relying on *Associated Press*, the court held that "[a] private organization may limit its services to its members as long as there is no arbitrary exclusion from membership, even where the services are economically necessary." *Id.* at 269-70.

ment proceedings. It stands, as court after court has understood, for the proposition "that an organization may lawfully limit its services and facilities to its members." [2]

The Eleventh Circuit's remand for a *per se* tying analysis is inconsistent with this Court's decision in *Associated Press*. The Solicitor General not only concedes that *per se* tying analysis is "rarely applicable" to membership organizations, he devotes several pages of his brief to an analysis of the correct standard under Section 1 that nowhere involves tying analysis. U.S. Br. 7-11. The government's discussion underscores petitioners' basic point that it "makes no sense to say that a restraint which is lawful when challenged as a boycott under Section 1 suddenly becomes *per se* unlawful once it is labeled a 'tying arrangement.' " Pet. 23.[3]

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[2] *Pope*, 695 F. Supp. at 270. *See, e.g., Worthen Bank & Trust Co.* v. *National BankAmericard, Inc.*, 485 F.2d 119, 128 (8th Cir. 1973) (Court in *Associated Press* refused to strike down ban against providing service to nonmembers), *cert. denied*, 415 U.S. 918 (1974); *State* v. *Cedar Rapids Bd. of Realtors*, 300 N.W.2d 127, 130 (Iowa 1981) (in *Associated Press* the "Court also . . . [held] that AP need not serve nonmember applicants to comply with antitrust laws"); *Murphy* v. *Alpha Realty, Inc.*, 1978-2 Trade Cases ¶ 62,388, p. 76,315 (N.D. Ill. 1978) (citing *Associated Press* for principle that "allows the Board to limit participation in the MLS to Board members"); *Martin-Trigona* v. *National Ass'n of Realtors*, 1978-1 Trade Cases ¶ 61,915, p. 73,873 (E.D. Ill. 1978) (same).

[3] As for *Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988) (*see* U.S. Br. 17), petitioners acknowledged in their opening brief that the decision below conflicted only "with the reasoning" of the First Circuit. Pet. 19. Regardless of the rationale, the overriding point is that no court, until the decision below, has held that a local board—or any association for that matter—must defend its chosen package of membership benefits and services on the merits against a challenge of *per se* tying. The Solicitor General agrees that, under this Court's precedents, "per se tying analysis is rarely applicable" in these circumstances. U.S. Br. 15. There is simply no point in remanding for further factual development of a claim that, as a matter of law, is not viable.

In addition, the Eleventh Circuit's decision squarely conflicts with four district court and two state supreme court decisions. Pet. 15-16. The government argues only that this Court should discount the conflicts with the two state supreme court decisions because they rest on state law. U.S. Br. 13 n.7. But the government simply ignores petitioners' point (Pet. 16) that these state courts, like most state courts, rely heavily on Sherman Act precedent in construing their state antitrust laws which were "patterned after the Sherman Act" and are "to be construed in harmony" with that Act. *Pomanowski* v. *Monmouth County Bd. of Realtors*, 446 A.2d 83, 87, 91 (N.J.), *cert. denied*, 459 U.S. 908 (1982) (internal quotes and cites omitted); see *State* v. *Cedar Rapids Bd. of Realtors*, 300 N.W.2d 127, 128 (Iowa 1981) (same). Moreover, it is undisputed and indisputable that, despite numerous opportunities, the Justice Department, like the federal courts, has never required a Board to abandon a cost-based and non-discriminatory Board membership requirement.[4] Yet, as discussed below, that effectively is the consequence of the Eleventh Circuit's decision.

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[4] In discussing the consent decrees, the government omits the fact that, in the case of the Oregon MLS, the MLS and the Board historically were separate entities with separate membership, and so there was no objection to a decree perpetuating that status. U.S. Br. 14. All other consent decrees, as the government necessarily concedes, expressly allowed Boards to maintain Board-membership requirements for MLS participation as long as the conditions of Board membership were "reasonable and nondiscriminatory"—precisely the standard enforced in *Pope* and that petitioners seek to vindicate here. *See id.*

For decrees allowing reasonable and nondiscriminatory board membership where the MLS was separately incorporated, *see United States* v. *Greater Syracuse Bd. of Realtors, Inc.*, 1980-81 Trade Cases ¶ 63,571, p. 77,039 ¶ VI (N.D.N.Y. 1980); *United States* v. *Real Estate Bd. of Rochester, Inc.*, 1974-2 Trade Cases ¶ 75,355, p. 98,129 ¶ V (W.D.N.Y. 1974); *United States* v. *Los Angeles Realty Bd.*, 1973-1 Trade Cases ¶ 74,366, p. 93,694 ¶ VI(A) (C.D. Cal. 1973). For comparable decrees where the MLS was not separately incorporated, *see United States* v. *Real Estate Bd. of Metro. St. Louis*, 1973-2 Trade Cases ¶ 74,744, p. 95,250 ¶ VI(A) (E.D. Mo. 1973); *United States* v. *Greater Pittsburgh Bd. of Realtors*, 1973-

These decisional conflicts, together with the Solicitor General's acknowledgement of the flaws in the decision below and its likely adverse national impact, are compelling reasons for this Court to hear this case.

2. Significantly, the Solicitor General does not argue that the interlocutory posture of the case is reason itself to deny certiorari, and for good reason—he acknowledges that the anticompetitive consequences of the ruling go beyond this case. U.S. Br. 7 & n.3. He suggests, however, that a remand is not inappropriate because "claims in this area should be resolved 'on a case-by-case basis, focusing on the particular facts disclosed by the record,' rather than on the basis of a per se rule." *Id.* at 10 (quoting *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, No. 90-1029, slip op. 13 (June 8, 1992)). This suggestion provides no basis for denying review in this case.

Petitioners agree that antitrust disputes should be resolved case-by-case. But that very process presupposes that a court has a proper standard to apply. Petitioners simply seek to have this Court resolve whether the Fifth Circuit in *Pope* or the Eleventh Circuit below correctly identified the controlling legal standard. All of the facts necessary to resolve this legal question are undisputed. Pet. 2-6 & n.1.

Moreover, the Solicitor General's discussion makes clear that the remand proceedings he envisions will require an expenditure of resources and time far in excess of what most associations can afford in order to defend their membership rules against antitrust challenges. Petitioners do not deny that they could go back to district court, retain expert witnesses, reinvent *The Logic of Collective Action*, define relevant markets, assess barriers to entry,

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1 Trade Cases ¶ 74,454, p. 94,037 ¶ VI(A) (W.D. Pa. 1973); *United States* v. *Memphis Bd. of Realtors*, 1972 Trade Cases ¶ 74,056, p. 92,374 ¶ VI(A) (W.D. Tenn. 1972). Copies of these decrees have been lodged with the Clerk.

and litigate the existence of separate product markets and numerous other subissues on tying that occupy so many pages in Professor Areeda's treatise.[5] But few, if any, local Boards or other associations will have the resources to engage in such expensive, time-consuming antitrust litigation in order to defend their membership rules. Under the government's approach, disgruntled individuals and groups who seek to pick and choose among an association's services will achieve by threat of attrition what the government admits they ought not be able to obtain by law.

The antitrust laws do not require this result. The Solicitor General acknowledges that "[p]roperly applied, the antitrust laws seldom should prevent a trade association from deciding for itself on the particular package of services and benefits it wishes to extend to members." U.S. Br. 10. He also admits that making services available to non-members will have substantial anticompetitive effects. "[I]f an assocation were required to make every service or benefit it provided available to non-members, there might be no members, no association, and thus none of the procompetitive benefits the association offers." U.S. Br. 8. At a minimum, the incentive for associations to develop new services, and the ability of associations to attract new members and accumulate the means necessary to develop and provide competitively valuable and comprehensive services, will be seriously undercut. See

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[5] On the boycott claim, the government, citing Mancur Olson's 1965 book *The Logic of Collective Action*, encourages petitioners to go back to the district court and develop new arguments about the "need to discourage free-riding" and about the ways in which the Board-membership requirement makes it "significantly more efficient to administer and enforce the no-solicitation and arbitration rules." U.S. Br. 8, 19-20. Similarly, on the tying claim, the government argues that, notwithstanding the court of appeals' holding that *per se* tying analysis controlled, petitioners should develop arguments based on Professor Areeda's three-hundred page treatise on tying about the reasons why "per se analysis does not apply . . . ." *Id.* at 15 (citing IX P. Areeda, *Antitrust Law* ¶ 1724(a), at 308-11 (1991)).

Brief of the American Society of Association Executives, *et al.*, as *Amicus Curiae* in Support of Petitioners 6-7, 11-12.

At the same time, no one—neither the court below, the respondents, nor the government—has been able to identify any anticompetitive effects flowing from an association's decision to enforce reasonable and nondiscriminatory membership rules. The most the government can say is that a "cost-based" membership fee might nevertheless be "unreasonable" if the fee included "services only remotely or tangentially related to members' professional activities." U.S. Br. 10. But that concern (which respondents have not raised) is just a refinement of petitioners' point that courts should focus on whether membership requirements are reasonable and nondiscriminatory. It provides no basis for remanding for extended proceedings on market power, the existence of a separate market for membership status apart from membership services, and other *per se* tying issues.

Petitioners' fundamental point is that reasonable and nondiscriminatory membership requirements do not exclude anybody because, by definition, all individuals are eligible to join the association and obtain the services on the same reasonable terms as everyone else. Enforcing such terms cannot be anticompetitive, because no one is unfairly excluded from obtaining services and the price of services is by definition cost-based. The focus of any antitrust challenge to membership requirements therefore should be—as it was in *Pope*—whether those requirements are truly reasonable and non-discriminatory, and not whether the association has market power, whether separate markets exist, etc. There is thus no need for a remand for this Court to resolve the question presented here. *Cf. FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986).[6] A remand will lead either

[6] In *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986), this Court held that where plaintiff could demonstrate that defendants' conduct had actual anticompetitive effects, it was error for

to an unwarranted victory by default for respondents or to a waste of judicial and private resources.

If this Court denies certiorari, the result will be precisely what the government predicts: The Eleventh Circuit's decision will "encourage (or prolong) unwarranted antitrust challenges to association membership requirements." *Id.* at 7 & n.3. These negative effects already are evident. The government acknowledges the disruption in the Eleventh Circuit alone, where over 100 Boards of Realtors currently are investing thousands of person-hours in the laborious, resource-intensive process of reviewing and revising their by-laws and membership requirements. *Id.* Petitioners are informed by *amicus* National Association of Realtors that one local board within the Eleventh Circuit has already chosen to admit a non-Board-member into its MLS, even though this individual had previously been expelled from the Board for repeated violations of Board rules. The cost of litigation under the Eleventh Circuit's standards was deemed too great to make enforcement of the Board's membership requirement worthwhile.

Outside the Eleventh Circuit, one Board already faces an antitrust suit filed in the wake of the decision below by a former member seeking MLS access. Other boards have been notified of the prospect of litigation if suitable accommodation of non-members is not obtained. (Copies of correspondence with the Solicitor General discussing this fall-out have been lodged with the Clerk). The prob-

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the court of appeals to remand for an analysis of market definition and market power. *Id.* at 460-61. Here, the converse is true. A remand for such market analysis seems equally inappropriate where, as here, it is evident that no anticompetitive effects can flow from defendants' maintenance of reasonable and nondiscriminatory membership requirements.

It is also worth noting that the Solicitor General declined to file a petition for certiorari on behalf of the FTC in the *Indiana Federation* case. The Commission was forced to rely on its independent litigating authority in order to seek reversal of the Seventh Circuit's inappropriate insistence on developing more facts. *See* Pet. 1 n.1, in *FTC* v. *Indiana Fed'n of Dentists*, No. 84-1809 (filed May 17, 1985).

lem of this decision "encourag[ing] (or prolong[ing]) unwarranted antitrust challenges to association membership requirements" (*id.* at 7) is thus a real one. After nearly two decades of consistent application of the *Associated Press* rule by courts and the Department of Justice alike, the anticompetitive litigation generated by the decision below is wholly unacceptable.

3. In sum, the Eleventh Circuit's decision simply cannot be reconciled with the decisions of this Court, other federal and state courts, and the practice of the Justice Department. No court has required local Boards to develop complicated data on market power, expert testimony on cost efficiencies and free-rider theory, separate markets analysis, and more, every time a disgruntled individual wants to get access to the multilist without joining the Board. Petitioners submit that a careful analysis of the relevant cases and antitrust principles will persuade this Court to grant review.

CONCLUSION

For these reasons and those stated in the petition and the reply, the petition for a writ of certiorari should be granted.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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RESPONDENTS' REPLY TO THE BRIEF OF THE UNITED STATES

The United States as Amicus Curiae correctly concludes that the petition for certiorari should be denied. The opinion of the Court of Appeals for the Eleventh Circuit does not conflict with decisions of either this Court or other courts of appeal, as the Solicitor General expressly agrees.

The decision below is consistent with *Associated Press v. United States,* 326 U.S. 1 (1945); and *Anderson v. United States,* 171 U.S. 604 (1898). Although a trade exchange necessary to economic success may

condition access upon payment for services rendered, neither *Associated Press* nor *Anderson* permits the exchange to require membership in an entirely different (nonexchange) organization as a condition of access. In this case, access to the multiple listing service is conditioned not solely upon joining Metro and paying Metro dues and fees, but also upon joining and paying dues to a separate organization altogether, a board of Realtors. Indeed, the Realtor requirement may be satisfied by joining a board other than Petitioner DeKalb Board, the corporate parent of Petitioner Metro.

Nor does the decision below conflict with *Pope v. Mississippi Real Estate Comm'n*, 872 F.2d 127 (5th Cir. 1989). Petitioners' attempts to redefine *Pope* notwithstanding, the *Pope* opinion confirms that the issue in that case was not Realtor membership as a condition of MLS access:

> The new [Realtor dues] schedule imposed a fee on each agency, plus an additional, slightly lower fee on each agent employed. As a result, the Popes were asked to pay nearly half of the total dues collected by the board. . . .
>
> * * *
>
> . . . Our inquiry is limited to determining whether the present fee schedule is reasonable.

Id. at 129, 130. The issue in *Pope* was thus apportionment of fees, not the exaction of Realtor dues. *Pope* poses no conflict with the instant case, as the Solicitor General agrees.

This Court should also deny certiorari in reliance upon its recent opinion in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, ___ U.S. ___, 60 U.S.L.W. 4465 [June 8, 192]. Petitioners contend that this Court should find their conduct "*per se* legal." Petitioners' Reply to the Brief of the United States, at 1-2. In effect, Petitioners argue that this Court may simply ignore the real-world economic effects of their dual membership requirement. Petitioners' argument amounts to the same sort of plea for "*per se* immunity" from the antitrust laws at the summary judgment stage which this Court rejected in *Kodak*. *Id.* at 4473 n.29.

Kodak rejected Petitioners' argument that any sort of plausible economic defense demands summary judgment:

> [I]n *Matsushita* [*Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 587 (1986) . . . t]he Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury.

60 U.S.L.W. at 4470 (emphasis in original). Plaintiffs showed, and the Eleventh Circuit concluded on these facts, that the dual membership requirement tends both to restrain competition in the market for professional association membership and to impose unnec-

essary costs for access to the market exchange. Summary judgment is unwarranted.[1]

Certiorari is also inappropriate for the other reasons shown in Respondents' initial brief, including the existence of factual issues yet to be resolved. For all of these reasons, Respondents once again urge denial of certiorari.

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[1] The brief of the Solicitor General suggests disagreement with the Eleventh Circuit over the precise test to be applied to Petitioners' conduct. In particular, the Solicitor General appears to advocate application of the rule of reason not just to Plaintiffs' group boycott claims, as the court below ruled, but to both aspects of this case. Respondents dispute the appropriateness of applying the rule of reason to Plaintiffs' tying claims. Even the Solicitor General did not find this disagreement sufficient to warrant grant of certiorari, however.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

DEKALB BOARD OF REALTORS, INC., ET AL., PETITIONERS

v.

FLETCHER L. THOMPSON, dba FLETCHER L. THOMPSON REALTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the district court erred in entering summary judgment on respondents' claim that requiring real estate brokers to join a local Board of Realtors in order to obtain access to the Board's multiple listing service violates Section 1 of the Sherman Act, 15 U.S.C. 1.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States in this case.

STATEMENT

1. Petitioner Metropolitan Multi-List, Inc. (Metro) operates a multiple listing service (MLS) in Atlanta, Georgia. Real estate brokers who participate in the MLS submit information about properties that are listed for sale with that broker. Metro compiles the information and makes it available to all its participating brokers. Any broker who produces a buyer for a listed property is entitled to share the resulting sales commission with the broker who submitted the listing to the MLS. It is very difficult for real estate brokers to compete effectively without access to an MLS. Indeed, "[b]rokers

consider the use of a multilist system a necessity." Pet. App. 2a.

Metro is a wholly owned subsidiary of petitioner DeKalb Board of Realtors (DeKalb), a member of the National Association of Realtors (NAR). DeKalb limits participation in Metro's MLS to real estate brokers who are members of DeKalb or another local branch of the NAR, such as the Atlanta Board of Realtors. Membership in a local Board of Realtors is open to any licensed real estate broker. The Board charges an annual membership fee. In addition, Board members must pay a deposit and various fees to Metro in order to participate in the MLS. Pet. App. 2a; Pet. 2-3.

Respondent Thompson is an Atlanta real estate broker who does not wish to join the Atlanta Board of Realtors. He is a member of respondent Empire Real Estate Board, Inc. (Empire). Empire is a membership organization that was founded to serve black real estate brokers in 1939, at a time when Boards of Realtors excluded black real estate brokers from membership. Empire provides many of the same services as a local Board of Realtors, but it does not operate an MLS in the Atlanta area. In 1988, Thompson applied for access to Metro's MLS. His application was rejected because he was not a member of a Board of Realtors. Pet. App. 3a; Pet. 5-6.

2. In 1988, Thompson and Empire filed an action against Metro and DeKalb, alleging that Metro's rule requiring membership in a Board of Realtors violates Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and the Fair Housing Act, 42 U.S.C. 3604, 3606. The district court granted summary judgment for Metro and DeKalb on all claims. Pet. 6-7. The court rejected respondents' claim that the membership requirement is a tying arrangement that is illegal per se under Section 1 of the Sherman Act. The court concluded that respondents had presented insufficient evidence that petitioners had market power in a relevant market or that Metro had an economic interest in the Atlanta Board of Real-

tors. Pet. App. 34a-37a. In addition, the district court found insufficient evidence of market power to support respondents' rule of reason claims under Section 1. Pet. App. 38a-40a. The district court also granted summary judgment for petitioners on the Section 2 claims. The court rejected respondents' "essential facilit[ies]" claim because it found that there was competition in the market for MLS services. And the court concluded that there was insufficient evidence of intent to monopolize to support a Section 2 conspiracy claim. Pet. App. 37a-38a, 41a-42a.[1]

3. The court of appeals affirmed the district court's entry of summary judgment for petitioners on the Section 2 claim, but reversed the entry of summary judgment on the Section 1 claims. Pet. App. 1a-30a. The court first held that respondent Thompson has standing to litigate the tying claim and group boycott claims, and that Empire has standing to litigate those claims as well as the conspiracy to monopolize claim. Pet. App. 4a-7a.

The court then turned to defining the relevant market. It agreed with the district court that the relevant product market is the market for multilist services. But the court of appeals concluded that there are disputed issues of material fact as to the scope of the relevant geographic market. Pet. App. 8a-9a. In particular, the court of appeals observed that respondents had presented "considerable evidence suggesting that Atlanta is not a homogeneous real estate market," that "brokers specialize in different areas of the city," and that respondents "specialize in real estate located on the south side of Atlanta." Pet. App. 10a-11a.

a. The court of appeals concluded that summary judgment was inappropriate on respondents' tying claim. The court analyzed the issue in light of what it stated were the "four basic elements of a *per se* tying claim":

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[1] The district court also granted summary judgment for petitioners on the Fair Housing Act claims. Pet. App. 42a-43a. Respondents did not appeal from that ruling. Pet. App. 4a n.2.

> 1) that there are two separate products, a "tying" product and a "tied" product; 2) that those [two] products are in fact "tied" together—that is, the buyer was forced to buy the tied product to get the tying product; 3) that the seller possesses sufficient economic power in the tying product market to coerce buyer acceptance of the tied product; and 4) involvement of a "not insubstantial" amount of interstate commerce in the market of the tied product.

Pet. App. 11a-12a (quoting *Tic-X-Press, Inc.* v. *Omni Promotions Co.*, 815 F.2d 1407, 1414 (11th Cir. 1987)). The court also considered a "fifth requirement that the tying company have an economic interest in the tied product. Pet. App. 12a. The court found that respondents had made out a prima facie case on all five elements.

As to the first factor, the court said that whether multiple listing services and professional association membership are separate products turns on whether there are separate markets for the two. Pet. App. 12a (citing *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2 (1984)). The court found that there was sufficient evidence of separate product markets to defeat summary judgment. In particular, the court cited

> evidence that the bill for joining the Realtors is separate from Metro's bill; that a broker can join the Realtors and choose not to use the multilist service; that, within Atlanta, there are at least two professional groups [Empire and the Atlanta Board] competing for members; that some local Realtor groups offer multilist services and some do not; that Metro was once an independent organization that was later purchased by the Realtors who imposed the Realtor membership requirement; and that in other [geographic] markets, multilist services are independent of professional membership.

Pet. App. 14a-15a.

Second, the court noted that the existence of a tie is undisputed, since Metro's MLS is admittedly available only to members of a Board of Realtors. Pet. App. 15a.

Third, the court found sufficient evidence that Metro had power in the multiple listing services market that could be used to coerce buyers to accept the tied product. The court pointed to evidence that multiple listing services are necessary to real estate brokers, and that there is a geographic market in which Metro operated the only MLS. Pet. App. 17a-18a. The court acknowledged that a competitor could purchase the physical assets needed to operate an MLS, but noted that there was evidence that "a new multilist service needs to build a substantial number of listings before it can become useful," and that "Metro has built an insurmountable amount of good will." Pet. App 18a. The court found sufficient evidence of coercion in the fact that Metro requires Board of Realtors membership and in affidavits indicating that (1) some members of the Boards of Realtors would give up their memberships but for the requirement, (2) some Empire members wanted access to Metro but could not afford both Empire and Board of Realtors membership, and (3) one Empire member wanted Metro access but did not want to join a Board of Realtors because of "their past history of discriminati[on] against African Americans." Pet. App. 19a.

Fourth, the court found sufficient evidence of a not insubstantial effect on interstate commerce in the tied market (professional association membership), since there was evidence that Empire's annual loss of dues amounts to at least $30,000. Pet. App. 20a-21a.

Finally, the court found sufficient evidence that Metro, a wholly owned subsidiary of the DeKalb Board, has an economic interest in the Atlanta Board, even though the court did not find that the Atlanta Board pays any portion of the dues or other funds it receives to the DeKalb Board or Metro. Pet. App. 21a-22a.

b. The court of appeals viewed respondents' rule of reason claim under Section 1 as alleging an unlawful group boycott that was not per se unlawful because of the "pro-competitive effects inherent in multilist services,"

Pet. App. 4a, 23a.[2] The court held that respondents had presented sufficient evidence to defeat summary judgment on this claim as well. Relying on its earlier decision in *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980), the court asserted that, if market power is shown, "where a broker is excluded from a multiple listing service with the requisite market power without an adequate justification in the competitive needs of the service, both the broker and the public are clearly harmed. [I]n these circumstances, the exclusion from the association will be found to violate Section 1" of the Sherman Act. Pet. App. 24a (quoting *Realty Multi-List*, 629 F.2d at 1371).

The court concluded that respondents had presented sufficient evidence of market power to survive a motion for summary judgment on the group boycott claim. In the group boycott context, the court ruled, market power turns on whether a multilist service has "sufficient economic importance that exclusion results in the denial of the opportunity to compete *effectively* on equal terms." Pet. App. 24a. The court recognized that the goal of inducing individual brokers to join the MLS is a legitimate, procompetitive justification for restrictions and that provisions of the Realtor code of ethics prohibiting brokers from soliciting each other's listings and requiring them to arbitrate disputes are "reasonable and narrowly tailored" to that end. Pet. App. 27a. The court further held, however, that a requirement of Realtor membership is "not narrowly tailored to the goal of inducing brokers to join the multilist system," because "Metro could easily impose its own 'no solicitation' and arbitration rules on its members." *Ibid.* Accordingly, the court concluded that if the district court finds on remand that Metro has

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[2] Respondents' complaint did not expressly allege an unlawful group boycott, and the district court did not analyze respondents' claim in those terms. In *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980), however, antitrust claims involving MLS membership requirements were analyzed as a group boycott. See 629 F.2d at 1354.

market power, "it must find that the Realtor membership requirements are an illegal group boycott." Pet. App. 28a. The court added, however, that "the Realtors are free on remand to raise other justifications for the realtor membership requirements." Pet. App. 28a n.13.

DISCUSSION

We agree with the court of appeals that "multilist services have many pro-competitive effects." Pet. App. 23a. In particular, multilist services "help eliminate imperfections in the marketplace by increasing the availability of information." *Ibid.* We are therefore troubled by the court of appeals' failure to acknowledge the significance of potential procompetitive justifications for a rule that restricts participation in an MLS to members of a local Board of Realtors. At a minimum, the court's analysis is incomplete, and may, in consequence, encourage (or prolong) unwarranted antitrust challenges to association membership requirements.[3] In addition, we believe that the court's analysis of respondents' tying claims does not take full account of the rationale of this Court's decision in *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, *supra*. Despite these analytical defects, the court of appeals' interlocutory decision creates no square conflict with a decision of this Court or a court of appeals. Accordingly, further review is unnecessary at this juncture.

1. Practices are held to be per se unlawful "because of their pernicious effect on competition and lack of any redeeming virtue." *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958). A rule restricting benefits offered by a voluntary association to members of the association

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[3] Petitioners have informed us that there are 176 local Boards of Realtors in the Eleventh Circuit, and that 111 of those Boards operate MLSs. As a result of the court of appeals' decision, these Boards are considering whether to amend their bylaws to permit non-member brokers to participate in MLSs. The court of appeals' decision may also encourage challenges to membership requirements in other parts of the country.

does not always, or even usually, have anticompetitive effects. Indeed, there may be important and legitimate reasons for such restrictions.

A voluntary association is a group organized to further some common interest or interests of its members. In many cases, an association's success in furthering its members' interests also benefits non-members who share those interests. A non-member who concludes that his participation is unlikely to make a significant difference to the association's prospects of achieving its goals, and who can enjoy the benefits of the association's efforts without incurring the costs of membership, will find it economically rational not to join. See generally M. Olson, *The Logic of Collective Action* (1965). But if no one joins, no benefits will be achieved.[4]

One way for a voluntary association to induce potential members to join rather than free-ride on the association's efforts is to provide some benefits that are restricted to members, such as an MLS. See M. Olson, *supra*, at 132-134; American Society of Association Executives, *et al.* Amicus Br. at 6. Benefits restricted to members serve as effective inducements to membership only if they are of significant value to potential members who would not otherwise join the association. Consequently, there will inevitably be potential members who would prefer to obtain such benefits by paying separately for them rather than by joining the association. But if an association were required to make every service or benefit it provided available to non-members, there might be no members, no association, and thus none of the procompetitive benefits the association offers. See Bodner, *Antitrust Restrictions on Trade Association Membership and Participation*, 54 A.B.A.J. 27, 32 (1968) ("[A]n associa-

[4] This is an example of the "free rider" problem that the Court has recognized in the context of non-price vertical restraints. See *Business Elec. Corp.* v. *Sharp Elec. Corp.*, 485 U.S. 717, 725 (1988); *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977).

tion cannot continue to exist if its activities are completely and unconditionally opened to outside participation. It is only through its activities that an association attracts and holds membership."). Accordingly, courts should be very cautious about characterizing practices in this area as per se illegal. Cf. *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 21-24 (1979) (agreement on price not per se unlawful if necessary to market product at all).

There may well be procompetitive justifications for limiting access to an MLS to members of a Board of Realtors. Such a membership rule may be necessary to induce a sufficient number of real estate brokers to join the Board and contribute to the cost of activities that benefit real estate brokers generally. Or it may be substantially more efficient to limit MLS participation to Board members. In some circumstances, however, it is possible that such a membership requirement could have anticompetitive effects. An MLS, unlike most services offered by trade associations, is a form of horizontal collaboration in the actual conduct of the participants' business activities. Indeed, an MLS is a prime example of a form of collaboration among competitors that can provide competitive efficiencies to the benefit of consumers. Cf. *Broadcast Music, Inc.* v. *CBS, Inc.*, *supra*. But those very benefits and efficiencies can significantly diminish the ability of those without access to the MLS to compete. Consequently, if the participants in an MLS were to place unreasonable burdens on access to that service, their conduct could transform a competitively beneficial form of horizontal collaboration into an instrument of concerted conduct that stifles competition.

We are not in accord with petitioners' apparent suggestion (Pet. 12) that membership rules restricting access to competitively important services such as an MLS are per se legal under the antitrust laws if they are (1) nondiscriminatory and (2) "reasonable," in the sense that membership fees accurately reflect the cost of the

full range of benefits and services that the association provides. Under that standard, a Board of Realtors would be free to impose on real estate brokers the cost of additional services—including services only remotely or tangentially related to members' professional activities—that the broker would not choose to purchase. Imposing such unrelated costs could, at least in theory, raise the price of access to the MLS beyond the means of brokers willing to pay the reasonable cost of the MLS itself. In other circumstances, imposing unrelated costs could place some brokers at a competitive disadvantage by requiring them to pay for services of less value to them than to their competitors. Even membership costs that burdened all brokers equally could have the effect, in theory, of facilitating a general price increase in the market for brokers' services. Accordingly, antitrust claims in this area should be resolved "on a case-by-case basis, focusing on the 'particular facts disclosed by the record,'" rather than on the basis of a per se rule. *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, No. 90-1029 (June 8, 1992), slip op. 13 (quoting *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563, 579 (1925)).[5]

Properly applied, the antitrust laws seldom should prevent a trade association from deciding for itself on the particular package of services and benefits it wishes to extend to members. As we discuss below, see pp. 14-

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[5] That is not to say that such cases cannot be resolved at the summary judgment stage. See generally *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 585-588 (1986). In this case, however, the potential procompetitive justifications for a membership requirement, and its possible anticompetitive effects, have not been well developed in the record. As the Court recently noted in somewhat similar circumstances in *Eastman Kodak*:

> We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. * * * In this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior go unpunished, the balance tips against summary judgment.

Slip op. 26.

18, *infra*, per se tying analysis is rarely appropriate in this context. Under the rule of reason, moreover, the fact that an association chooses to offer a particular bundle of services and benefits to its members may have procompetitive effects, and will seldom have significant anticompetitive effects. Even if access to one of the services offered by a trade association is necessary to allow members and their competitors to compete effectively, the pertinent question is not whether other parts of the package are necessary to the competitively necessary service, see note 6, *infra*, but whether the entire package is unreasonable, in the sense that it has anticompetitive effects that outweigh its procompetitive effects. See *Eastman Kodak Co.*, slip op. 33.

2. Petitioners contend (Pet. 12-19) that the court of appeals' decision conflicts with this Court's decisions in *Associated Press* v. *United States*, 326 U.S. 1 (1945), and *Anderson* v. *United States*, 171 U.S. 604 (1898). We do not agree. Respondents are challenging a rule that denies them access to an MLS unless they pay membership dues to the Board of Realtors. The cases on which petitioners rely do not go so far as to hold that such a requirement is per se legal if membership is open to any real estate broker and the dues accurately reflect the costs of the full range of services and benefits provided to members.

In *Associated Press* v. *United States*, 326 U.S. 1 (1945), the Court affirmed the entry of summary judgment against the Associated Press (AP), an association of newspapers that "prohibited [its] members from selling news to non-members, and * * * granted each member powers to block its non-member competitors from membership." 326 U.S. at 4. The Court focused on the rules that permitted AP members to exclude their competitors from membership, and held that an association of competitors may not restrict access to a competitively important service to members of the association if the restrictions are "designed to stifle competition." 326 U.S. at 19. In this case, membership in a Board of

Realtors is open to any licensed broker, and there appears to be no evidence that the membership rule is "designed to stifle competition." But the *Associated Press* decision does not address membership rules that, even if not intended to stifle competition, nevertheless may affect competition by imposing on would-be users costs unrelated to a service regarded as a "necessity." Pet. App. 2a. We recognize that the *Associated Press* Court rejected the government's contention that the AP should be required to grant non-members access to its services. 326 U.S. at 21-22. But the Court did so because "the government chose to present its case on the narrow issues which were within the realm of undisputed facts," and the Court was unable to conclude "[i]n the situation thus narrowly presented * * * * that the [district court's] decree should have gone further than it did." *Id.* at 22. The Court observed that the government was free to reopen the question in the district court "[i]f * * * the decree in its present form should not prove adequate to prevent further discriminatory trade restraints against non-member newspapers." *Ibid.*

Similarly, in *Anderson* v. *United States*, 171 U.S. 604 (1898), an early antitrust decision concerning a livestock exchange, the Court did no more than approve an organization whose members agreed to do business only with other members, where "[e]very one [could] become a member of the association" and the membership rule reasonably furthered the legitimate purposes of the association. *Id.* at 619-620. *Anderson* does not suggest that the members of the exchange could have placed unreasonable burdens on access to the exchange by requiring would-be competitors to pay significant fees for services unrelated to the operation of the exchange.[6]

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[6] Although we disagree with petitioners' contention that the court of appeals' decision conflicts with decisions of this Court, we also disagree with respondents' suggestion (Br. in Opp. 4 n.5) that *Ellis* v. *Brotherhood of Railway Clerks*, 466 U.S. 435 (1984), and *Abood*

Petitioners' contention (Pet. 10, 13-15) that the decision in this case conflicts with *Pope* v. *Mississippi Real Estate Comm'n*, 872 F.2d 127 (5th Cir. 1989), is also unpersuasive. The plaintiffs in *Pope* brought an action against a local Board of Realtors challenging the Board's decision to assess dues based on the number of agents employed by each member agency. The court of appeals noted that the plaintiffs "d[id] not challenge the amount of fees the board collects," but only "the apportionment of the fees among the board members." 872 F.2d at 130. The court held that it was reasonable to charge the plaintiffs "half the cost of running the MLS" because they "controlled approximately half the real estate market" and "[o]ne half of the listings will likely be theirs." *Id.* at 131. Thus, *Pope* did not hold that an association may deny access to a competitively necessary service to those who are unwilling or unable to pay substantial additional costs for an unreasonable package of other services or activities. Indeed, the court explained that its decision in *Realty Multi-List* held that

> a MLS could not collect more dues than was reasonably necessary to run the MLS service. * * * To collect more than the cost of the service creates a barrier to the admittance of any new member and is without competitive justification. * * *

872 F.2d at 130 (citing *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1368-1369 (5th Cir. 1980)).[7]

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v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), make it unlawful under the antitrust laws to burden membership in an MLS with any fees that are not "germane" to the MLS. *Ellis* and *Abood* are not antitrust cases; those decisions rest on principles far removed from the consumer welfare concerns of antitrust law.

[7] Petitioners also contend (Pet. 10, 16) that the court of appeals' decision conflicts with the decisions of the Iowa Supreme Court in *State* v. *Cedar Rapids Bd. of Realtors*, 300 N.W.2d 127 (1981), and the New Jersey Supreme Court in *Pomanowski* v. *Monmouth County Bd. of Realtors*, 446 A.2d 83, cert. denied, 459 U.S. 908

We also disagree with petitioners' contention (Pet. 10, 17) that the court of appeals' decision "conflicts with the position taken by the United States Department of Justice in numerous cases and consent decrees involving local boards and multiple listing services." The government's primary concern in those cases was with rules that excluded realtors from membership in local Boards, not rules that required membership. In at least one case, moreover, the Justice Department obtained a consent decree that prohibited the MLS from "[r]efusing to accept for membership any real estate broker because said broker is not a member of any local, state or national realty board or association." *United States* v. *Multiple Listing Service*, 1972 Trade Cas. (CCH) ¶ 74,221, at 93,022 (D. Or. 1972). In other cases, the consent decrees did not authorize a membership requirement in all circumstances, but merely authorized "reasonable and nondiscriminatory written requirements for membership." See, *e.g.*, *United States* v. *Greater Pittsburgh Bd. of Realtors*, 1973-1 Trade Cas. (CCH) ¶ 74,454, at 94,037 (W.D. Pa. 1973); *United States* v. *Los Angeles Realty Bd.*, 1973-1 Trade Cas. (CCH) ¶ 74,366, at 93, 694 (C.D. Cal. 1973).

3. Petitioners challenge (Pet. 19-24) the court of appeals' analysis of respondents' claim that Metro's membership rule is a tying arrangement that is illegal per se under the Sherman Act. We agree with petitioners that the court of appeals' discussion of the tying claim does not appreciate fully the rationale of this Court's decision in *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, *supra*.

(1982). As petitioners recognize (Pet. 16), however, both of those decisions rest on state law. In addition, neither decision supports the broad proposition that association membership requirements are per se legal as long as membership is open to all and fees are a reasonable reflection of the cost of whatever services are provided by the association. Indeed, the New Jersey Supreme Court expressly noted in *Pomanowski* that "there is no contention that the cost [of Board membership] is prohibitively high." 446 A.2d at 92.

Under *Hyde* (and the Court's recent decision in *Eastman Kodak Co.*), per se tying analysis is rarely applicable to a package of benefits and services offered by a trade association to its members.

The Court has recognized that "not every refusal to sell two products separately" is an illegal tying arrangement, let alone a per se violation of the antitrust laws. *Hyde*, 466 U.S. at 11. In many instances, "package sales" are both attractive to buyers and "entirely consistent with the Sherman Act." *Id.* at 12. As an initial matter, a trade association typically lacks the market power required "to force a purchaser to do something that he would not do in a competitive market." *Id.* at 14. Moreover, tying analysis is inappropriate unless there are two separate product markets—that is, "unless * * * it is efficient to offer [the tied product] * * * separately from * * * [the tying product]." *Id.* at 21-22. In addition, even if a trade association possesses market power and there are two separate product markets, per se tying analysis is inappropriate unless "that power is used to impair competition on the merits in another market." *Id.* at 14. Accordingly, per se analysis does not apply "when a purchaser is 'forced' to buy a [tied] product he would not have otherwise bought," because "no portion of the market which would otherwise have been available to other sellers has been foreclosed," and therefore "there can be no adverse impact on competition." *Id.* at 16. See 9 P. Areeda, *Antitrust Law* ¶ 1724(a), at 308-311 (1991).[8]

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[8] The court of appeals found evidence that petitioners' membership requirement has caused Empire to lose nearly 400 members, resulting in an annual loss of dues of $30,000 to $70,000. Pet. App. 20a-21a. This case appears to be unusual, however, because many Boards of Realtors face no local competition in the market for professional association membership. There are more than 1,800 local Boards of Realtors, with a total membership of some 700,000. Federal Trade Commission Staff Report, *The Residential Real Estate Brokerage Industry* 80, 83 (1983) [hereinafter FTC Staff Report]. In contrast, the National Association of Real Estate Brokers—the

In considering whether membership in a professional association of realtors and multilist services are separate products for purposes of a tying claim, the court of appeals focused (Pet. App. 12a-15a) on the evidentiary factors listed in this Court's opinion in *Hyde*. But the Court in *Hyde* considered whether there was "*sufficient* demand for the purchase of [one item] separate from [the other] to identify a distinct product market in which *it is efficient* to offer [the one] separately from [the other]." 466 U.S. at 21-22 (emphasis added). See also *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, slip op. 8 (same). In contrast, the court of appeals' discussion suggests that it might be satisfied with evidence of *any* separate demand and the mere *possibility* of offering the products separately, regardless of efficiency considerations and regardless of whether competition in a market for the tied product can be affected. Pet. App. 14a-15a.[9]

In addition, the court of appeals, in considering whether there is a separate market for professional affiliation, did not take account of other services or benefits afforded to members of Boards of Realtors. See Pet.

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only other significant professional association in the field—has about 5,000 members, or less than 1% of the membership of the NAR. *Id.* at 84.

[9] The court of appeals noted that there were "at least 55 multilisting services operating in the United States that were independent of any local Realtor organization." Pet. App. 15a. But the source on which the court relied points out that 35% of these 55 multilist services nevertheless require Realtor membership. FTC Staff Report at 117. Moreover, the 55 multilist services amounted to less than 6% of all multilist services. *Id.* at 116. In addition, there was evidence that the percentage of multilist services that are independent of Realtor organizations is decreasing. *Id.* at 117-118. These data hardly demonstrate the efficiency of offering multilist services separately from Realtor membership. In contrast, this Court, in considering whether anesthesiological services and hospital services were separate products, noted that only 27% of anesthesiologists had financial relationships with hospitals and that there was a trend toward independent anesthesiological practices. *Hyde*, 466 U.S. at 23 n.36.

App. 14a & n.7; Br. in Opp. App. 1a-7a. The evidence of separate demand for professional affiliation that the court of appeals perceived in the record may have been nothing more than separate demand for other severable services. Only by excluding all benefits for which there is a separate demand could a court determine whether there is a separate market for professional association membership apart from the menu of services that the association offers to its members.

Although we are troubled by the court of appeals' analysis, we disagree with petitioners' contention (Pet. 19-20) that the court of appeals' decision conflicts with the First Circuit's decision in *Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir.), cert. denied, 488 U.S. 955 (1988). The court of appeals did not hold that there are two separate products in this case, but only "that summary judgment in favor of the defendant on this element of the claim would be inappropriate." Pet. App. 15a. In any event, the First Circuit in *Wells* rejected the tying claim because the plaintiff "failed to demonstrate the slightest market for membership in real estate boards that might have been affected" by the alleged tie. *Wells*, 850 F.2d at 815. Although the court added that it was "doubtful whether this situation constitutes a 'tie' of separate 'products,'" it expressly stated that "[w]e need not definitively determine whether such a characterization would ever be apt, however, because we affirm the dismissal for the reasons stated above." *Ibid.*[10]

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[10] Petitioners also contend (Pet. 21-23) that the court of appeals erroneously concluded that proof of good will is sufficient to establish a barrier to entry for purposes of the tying claim, and that this conclusion conflicts with *United States* v. *Syufy Enter.*, 903 F.2d 659 (9th Cir. 1990), and *United States* v. *Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984). The court of appeals stated:

> The plaintiffs argue that they have met their burden of production [on barriers to entry] by placing into the record proof that a new multilist service needs to build a substantial number of listings before it can become useful. The plaintiffs argue

In sum, the court of appeals did not hold that Metro's requirement of Board of Realtors membership is a per se unlawful tying arrangement—or, indeed, that it is a tying arrangement between two separate products at all. It held only that respondents had presented sufficient evidence to go to trial on that claim. Despite our reservations about the court of appeals' analysis, we do not believe that it precludes proper consideration of the issues on remand to the district court.

4. Petitioners also contend (Pet. 18) that the court of appeals' rule of reason analysis established "an insuperable and inappropriate 'least restrictive means' standard [that] is tantamount to per se condemnation of the membership requirement [because] [i]t will always be possible for a court to say that an MLS can operate without a requirement of board membership." We do not agree that the court of appeals' opinion must be—or should be—read as an across-the-board endorsement of such a restrictive standard. Indeed, we would strenuously resist any such rigid mode of analysis. See *Premier Elec. Constr. Co.* v. *National Elec. Contractors Ass'n*, 814 F.2d 358, 370 (7th Cir. 1987) (courts applying rule of reason analysis to forms of cooperative behavior are "appropriately

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> that Metro has built an insurmountable amount of good will and the plaintiffs point out that an individual attempted to compete with Metro and that for a variety of reasons, including this good will barrier, his effort failed.

Pet. App. 18a. Read in context, the court of appeals' reference to "good will" may well be no more than a short-hand reference to the alleged "need[] to build a substantial number of listings," (*ibid.*), and the difficulty of doing so where a successful MLS already exists. That interpretation is reinforced by respondents' brief in the court of appeals, which did not mention good will but instead contended that "[m]ultiple listing services tend toward 'natural monopolies.'" Resp. C.A. Br. 21 (citing *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1373 n.42 (5th Cir. 1980) ("the larger the service, the more effectively it may operate")). The court of appeals' ambiguous statement does not warrant interlocutory review.

modest about their ability to discern the optimal amount of cooperation in any industry"); *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 229 n.11 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987) ("Once it is clear that restraints can only be intended to enhance efficiency rather than to restrict output, the degree of restraint is a matter of business rather than legal judgment.").

The court of appeals based its analysis of the group boycott claim on its opinion in *Realty Multi-List*, which concluded that restrictions on membership in a multilist service are acceptable under the rule of reason if "reasonably necessary to the accomplishment of * * * legitimate goals and narrowly tailored to that end." Pet. App. 26a (quoting 629 F.2d at 1375). The court concluded in this case that requiring prospective MLS members to subscribe to the no-solicitation rule and the arbitration provision of the Board of Realtors code of ethics would be both reasonably necessary to the legitimate, procompetitive goal of inducing membership in the MLS and narrowly tailored to that end. But the court further concluded that requiring Realtor membership would not be narrowly tailored because "Metro could easily impose its own 'no solicitation' and arbitration rules on its members." Pet. App. 27a. The court therefore held that—assuming Metro has market power—the Realtor membership requirement is unlawful, unless "the Realtors * * * raise other justifications for the realtor membership requirements" on remand. *Id.* at 28a n.13.

The court of appeals expressly left open the possibility that Metro's rule might be justified on remand, even if the district court determines that Metro has market power. The court of appeals did not undertake to anticipate other justifications that might be offered to the district court. For example, the court did not discuss whether a need to discourage free-riding by offering brokers inducements to join a Board of Realtors could justify the challenged rule. Nor did the court discuss the possibility

that it is significantly more efficient to administer and enforce the no soliciation and arbitration rules through the Board of Realtors rather than through the MLS. In addition, the court did not consider whether petitioners must demonstrate that every aspect of Realtor membership is necessary to the legitimate goals of the MLS, or whether it would be sufficient to show that aspects accounting for most of the annual dues are reasonably necessary to the MLS's legitimate goals. See *Realty Multi-List*, 629 F.2d at 1386 ("sizeable membership fee which bears no relation to [the costs necessary to the MLS] may * * * create 'a strong inference that the amount has been set up as a barrier against' new applications"). The court of appeals' interlocutory decision therefore does not foreclose petitioners from introducing evidence on remand that the challenged rule serves legitimate purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DEKALB BOARD OF REALTORS, INC., and METROPOLITAN MULTI-LIST, INC.,

Petitioners,

v.

FLETCHER L. THOMPSON, and EMPIRE REAL ESTATE BOARD, INC.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF REALTORS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF REALTORS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The National Association of Realtors respectfully submits this brief as *amicus curiae* in support of the petition for writ of certiorari filed by the DeKalb Board of Realtors, Inc. and Metropolitan Multi-List, Inc. The written consent of all parties has been obtained and filed with the Clerk in accordance with Supreme Court Rule 37.2.

INTEREST OF *AMICUS CURIAE*

The National Association of Realtors ("NAR") is a private not-for-profit professional association comprised of fifty-four State and Territorial Associations of Realtors, approximately 1,800 local Boards of Realtors (hereinafter "Boards"), and over 720,000 individual Realtors and Realtor-Associates engaged in all facets of the real estate business, including brokerage, appraising, management, and counseling.[1] Founded in 1908, NAR's purposes are to promote the highest and best use of the land, protect private ownership of real property and establish high and uniform professional standards of real estate practice.

When NAR was founded, multiple listing services ("MLSs") did not exist in their current form and cooperation among brokers was rare and narrowly circumscribed. Among NAR's objectives when it created the Realtors Code of Ethics in 1913 was to foster inter-broker cooperation, which it made an express obligation of the Code to which all NAR members are required to subscribe.[2] For nearly a century, NAR has encouraged broker cooperation, primarily through the promotion of multiple listing services as a Board service. Today, nearly two-thirds of NAR's member Boards operate MLSs for the benefit of their members.

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[1] The terms "Realtor®", "Realtors®" and "Realtor-Associate®" are registered collective membership marks that identify real estate professionals who are members of the National Association of Realtors and subscribe to the Realtors Code of Ethics.

[2] The Articles of the Realtors Code of Ethics are reproduced as an Appendix to this brief.

Nearly all Boards that operate MLSs require broker participants in the service to become Board members.[3] This requirement ensures that all MLS participants have agreed to adhere to the national Realtors Code of Ethics promulgated by NAR, and submit to uniform adjudicatory procedures if an ethics charge, or arbitration request, is made against the participant.

In this case, the court of appeals held that a Board's refusal to grant MLS participation privileges to a broker who is unwilling to join a Board of Realtors could constitute a group boycott or tying arrangement in violation of the Sherman Act, 15 U.S.C. § 1 *et seq.* This decision conflicts with numerous federal and state court decisions holding that Board MLSs need not provide MLS participation to brokers who simply refuse, for whatever personal reasons, to become Board members.

If permitted to stand, the court of appeals' ruling will undercut the settled expectations of Boards and individual real estate brokers nationwide. Furthermore, the membership requirement at issue in this case has been extensively reviewed by the Antitrust Division of the Justice Department, which has never once suggested that a Board membership requirement as a condition of access to a Board MLS is, standing alone, an unreasonable trade restraint.

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[3] Boards in California do not impose this requirement because it was found to violate the California antitrust laws. See *Glendale Board of Realtors v. Hounsell*, 139 Cal. Rptr. 830 (Cal. Ct. App. 1977).

BACKGROUND

Nearly 1,000 Boards currently operate MLSs to enhance the professionalism, competitiveness, and efficiency of the real estate and real estate brokerage markets throughout the United States. To understand how Board MLSs increase consumer welfare, it is necessary to consider: (1) the origins of multiple listing, (2) the emergence of NAR and the Realtors Code of Ethics, (3) NAR's support services, and (4) NAR's antitrust compliance program.

1. The Origins of Multiple Listing

MLSs have their origins in the late nineteenth century when real estate brokers began to form "real estate exchanges." In an exchange, a broker with a listing contacted other brokers who might be working with buyers interested in the listed property. Similarly, a broker working with a buyer would contact other brokers seeking listings meeting the buyer's specifications. In small markets where real estate brokers knew each other's reputation, the exchanges improved the efficiency of the real estate brokerage business. See generally, Davies, *Real Estate in American History*, 4-5, 20-27 (1958).

As real estate markets broadened and more brokers competed for available listings, brokers became reluctant to share listing information with other brokers whose business reputations they did not know. This reluctance was justified. Brokers could abuse invitations to cooperate by contacting sellers to persuade them to shift the listing to the other broker. Brokers might intentionally or negligently misrepresent the condition of the property to pro-

spective purchasers, and create legal liability for the listing broker or the seller. Other brokers might secretly acquire the listed property for their own account, quickly resell it at a profit, and unlawfully deprive the seller of the fair value of the property.

Similarly, brokers dealing with listing brokers with whom they were unfamiliar ran the risk of arbitrary refusals by listing brokers to pay them if they successfully procured a buyer for the listed property. Alternatively, listing brokers might withhold an offer procured by another broker until the listing broker's own agent procured a competing offer that the seller would then be induced to accept.

At the turn of the century, industry leaders realized that the real estate brokerage business could not rid itself of fraud, corruption and abusive self-dealing unless two things happened. First, real estate brokers must become more honorable and professional in their dealings with customers, clients, and each other. Second, a system was needed to encourage listing brokers to cooperate with other brokers to achieve the client's objective of a prompt sale at a fair price.

By offering the unsuccessful competitor for the listing an opportunity to participate in, and profit from, the marketing and sale of the property, the successful listing broker enhances the likelihood the property will be sold during the listing term. At the same time, an offer of cooperation encourages competing brokers to market the listed property, rather than undermine the listing broker's efforts with the hope of securing the listing once the seller becomes frustrated with the listing broker's inability to sell the property.

2. The Emergence of NAR and the Realtors Code of Ethics

Various real estate exchanges around the country united in 1908 to form the National Association of Real Estate Exchanges, which later became the National Association of Real Estate Boards and eventually NAR. The first mission of NAR's predecessor organizations was to create a Realtors Code of Ethics that would elevate the real estate brokerage business to a profession. The organizations' objective was to eliminate the perception of real estate brokers as speculators owing duties to no one but themselves. To this end, the Realtors Code of Ethics was adopted in 1913. The Code recast the real estate broker as a fiduciary owing duties of loyalty and fidelity to clients who entrust their property to the broker for sale or rent on terms and conditions most advantageous to the client.

To induce real estate brokers to become fiduciaries, NAR also promoted the exclusive listing of real estate. This type of listing induces the greatest degree of effort and commitment from brokers because brokers are assured that they will earn a commission if the property is sold during the listing term. But the number of agents authorized to market an exclusive listing is limited to those affiliated with the listing broker. This problem of limited market exposure is solved, however, if brokers cooperate with one another in the marketing of the property once the exclusive listing agreement is signed.

For these reasons, a third major objective of NAR in its efforts to professionalize the real estate brokerage business was to promote inter-broker cooperation. NAR promoted broker cooperation in two ways. First, it imposed upon its member Realtors an ethical obligation to utilize the services of other brokers on exclusively listed

property whenever such use was in the best interests of the client. This obligation is found today in Article 22 of the Realtors Code of Ethics, and applies to all Realtors whether or not they are MLS participants.

Second, it encouraged Boards to form MLSs to permit Board members to cooperate with each other on a blanket basis, rather than through bilateral arrangements from which smaller competitors or new market entrants were typically excluded. By making the MLS a Board service, NAR ensured that MLS participation was available to all competitors in the market, and not only the large and established firms.

Together, the rise of multiple listing and the emergence of NAR and its Code of Ethics dramatically increased the volume and efficiency of real estate transactions. See FTC Staff Report, *The Residential Real Estate Brokerage Industry* 92-93, (1983). By the 1920s, multiple listing had become the predominant way of selling real estate in the United States. Today, the vast majority of MLSs are operated by Boards of Realtors.

Although independent MLSs also exist, they are not, on average, nearly as successful as Board MLSs. *Id.* at 117.[4] Significantly, many independent MLSs have found it advantageous to impose their own Realtor membership requirements despite their independence from a Board of Realtors. The FTC staff found in their 1983 study of the real estate brokerage industry that 35% of independent

[4] See Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 Colum. L. Rev. 1325, 1329 (1970) ("Because of its many ancillary services . . . a real estate board is more capable of assuring complete cooperation among participants than would be possible under an independent multiple listing system.").

MLSs require Realtor membership as a condition of participation. *Id.* A majority of independent MLSs have also conformed their bylaws, rules and policies to NAR guidelines. *Id.* These figures vividly demonstrate the importance of Realtor membership and adherence to the Code to the successful operation of an MLS.

3. NAR's Support Services

Besides the Code of Ethics itself, NAR provides Boards and their MLSs with numerous support services relating to MLS operations and Code of Ethics enforcement. These nationally developed policies and procedures avoid duplication of efforts by each Board, foster confidence in the system, and promote fair and uniform results.

For example, NAR provides Boards with extensive policy guidance on MLS operations. See NAR, *Handbook on Multiple Listing Policy* (5th ed. 1991). This guidance includes forms, policy statements, and suggested bylaws, rules and regulations. NAR also furnishes Boards with Official Interpretations and Standards of Practice that interpret the Articles of the Code of Ethics. See NAR, *Interpretations of the Code of Ethics* (1990). Like the Code itself, these Interpretations and Standards are binding upon each Board. Many Interpretations and Standards involve the application of the Code to inter-broker cooperative relationships.

Further, NAR provides Boards with uniform procedures for handling disputes. Under these procedures, each Board operates an adjudicatory process for ethics charges and another for requests for arbitration. The ethics process is used to determine whether the Realtors Code of Ethics has been violated. The arbitration process is used to resolve disputes between brokers concerning entitlement to

a commission. In both types of proceedings, matters are adjudicated by volunteer panels of local Realtors. See NAR, *Code of Ethics and Arbitration Manual* (1991); NAR, *Professional Standards Training Manual* (1991).

4. NAR's Antitrust Compliance Program

A significant number of residential real estate transactions involve properties disseminated through multiple listing services. To ensure that a Board MLS provides all licensed real estate brokers a fair opportunity to participate, NAR policy strictly forbids any Board from adopting arbitrary or unreasonable criteria for Board membership. *See* NAR Bylaws, Art. I, sec. 2.[5]

NAR prohibits discriminatory Board membership criteria, in part, because of consultations with the Antitrust Division of the Justice Department in the early 1970s. At that time, the Justice Department was involved in litigation against over a dozen Boards of Realtors.[6] See generally NAR, *Antitrust and Real Estate*, ch. 2 (1982). Although the lawsuits involved challenges to a number of industry practices, not one of the suits challenged the requirement that participation in a Board MLS be limited

[5] In addition, NAR policy requires each Board that operates an MLS to make the MLS available to all Board members upon payment of a reasonable, cost-based fee. NAR *Handbook on Multiple Listing Policy*, §§ 8.2, 8.4 (5th ed. 1991).

[6] See, *e.g.*, *United States v. Greater Pittsburgh Board of Realtors*, 1973-1 Trade Cases ¶ 74,454 (W.D. Pa. 1973); *United States v. Real Estate Board of Metropolitan St. Louis*, 1973-2 Trade Cases ¶ 74,744 (E.D. Mo. 1973); *United States v. Los Angeles Realty Board*, 1973-1 Trade Cases ¶ 74,366 (C.D. Cal. 1973); *United States v. Long Island Board of Realtors*, 1972 Trade Cases ¶ 74,068 (E.D.N.Y 1972); *United States v. Memphis Board of Realtors*, 1972 Trade Cases ¶ 74,056 (W.D. Tenn. 1972) (consent decrees).

to Board members so long as Board membership is available to all brokers on reasonable and non-discriminatory terms.

In the midst of this litigation, NAR representatives met with Justice Department officials to develop principles to ensure Board antitrust compliance. *Antitrust and Real Estate, supra*, Ch. 2, at 8-10. The result was two key NAR policies that remain in effect today. First, NAR's "Fourteen Point Multiple Listing Policy" identifies fourteen restrictions that a Board MLS may not adopt.[7] Second, NAR's "Membership Qualification Criteria" specifies the most rigorous standards that a Board may impose when admitting members.[8] To ensure that each Board adopted these policies, NAR initiated a nationwide antitrust compliance program through which NAR reviewed the governing documents and MLS rules of over 1600 Boards.[9] *Antitrust and Real Estate, supra*, ch. 2, at 8-10.

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[7] For example, a Board-operated MLS may not: fix, control, or recommend commission rates or fees for services rendered by members; make any rule prohibiting or discouraging cooperation with non-members; or reject any exclusive listing submitted by a member based on the quality or price of the listing. See NAR, *Handbook on Multiple Listing Policy*, Ch. 6, at 1-2 (5th ed. 1991). In addition, a Board's MLS may not require any one to participate in the MLS as a condition of Board membership. *Id.* at 7.

[8] As amended in February of 1991, the Membership Qualification Criteria are: (1) a valid real estate license; (2) a place of business within the Board's jurisdiction; (3) no record of official sanctions involving unprofessional conduct; (4) no recent or pending bankruptcy; (5) completed the Board indoctrination course; (6) agreement to abide by the Realtors Code of Ethics; and (7) agreement to abide by the Constitution, Bylaws, policy, and rules and regulations of the local Board, state association, and NAR.

[9] NAR continues to employ fifteen full-time staff people whose primary responsibility includes reviewing Board governing documents to ensure compliance with NAR policy.

As a consequence of these actions, the Justice Department settled its lawsuits against Boards and their MLSs. The resulting consent decrees reflect the understandings between the Department and NAR concerning Board conduct permitted under the antitrust laws. Significantly, many of the decrees expressly required the Boards to admit to membership any licensed applicant who met "reasonable and non-discriminatory written requirements for membership."[10] But none of the decrees required any Board to abandon the requirement that participants in the Board's MLS be Board members.[11]

Even after the consent decrees were finalized, the Justice Department continued to monitor the real estate brokerage industry. In particular, the Department conducted a nationwide compliance audit in 1974 and 1975 during which it reviewed the bylaws, rules, and other governing documents of over forty Boards. By that time NAR had required all of its member Boards to adopt reasonable and non-discriminatory membership policies in accordance with the NAR's Multiple Listing Policy and Membership Qualification Criteria. See *Antitrust and Real Estate*, *supra*, ch. 2 at 10-11. The compliance audit did not result in any new challenges against any Board of Realtors.[12]

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[10] See consent decrees cited in n. 6, *supra*.

[11] Indeed, the Department has expressly taken the position that even a Board subject to a consent decree may limit participant in its affiliated MLS to Realtors. See *O'Riordan v. Long Island Board of Realtors*, 707 F. Supp. 111, 113 (E.D.N.Y. 1989) (noting letter by Department of Justice to local Board to this effect).

[12] The Justice Department did bring subsequent challenges to the membership requirements of independent MLSs that were not affiliated with the NAR. See e.g., *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980).

REASONS FOR GRANTING THE PETITION

Amicus NAR endorses the petition. NAR submits this brief to underscore the fundamental importance of this case to brokers and Boards of Realtors nationwide.

NAR believes that this Court should review the Eleventh Circuit's decision for three reasons. First, the ruling below conflicts with this Court's decision in *Associated Press v. United States*, 326 U.S. 1 (1945), and with numerous federal and state court decisions upholding the membership requirement. Second, the decision below threatens to reduce the efficiency and procompetitive effects of hundreds of Board MLSs.

Finally, the decision undermines settled expectations of brokers and Boards across the country. It is fundamentally unfair to permit a single appellate court panel in private litigation to upset a system so carefully developed and so effective. It is therefore manifestly appropriate that if the Board membership requirement shall now be declared to be a Sherman Act violation, such a declaration should be made by this Court.

1. Ever since this Court's decision in *Associated Press v. United States*, 326 U.S. 1 (1945), the principle has been well-established that a membership association is not required to provide access to its services to non-members when association membership is available on reasonable and non-discriminatory terms. *Associated Press* involved an association bylaw that prohibited members from making pooled news items available to non-members. Judge Learned Hand held that this bylaw, standing alone, was not only permissible but "essential to the protection of the main purpose" of the association. 52 F. Supp. 362,

374 (S.D.N.Y 1943). *Id.* On appeal, this Court expressly affirmed this aspect of Judge Hand's decision. 326 U.S. at 22.

Like the Associated Press, an MLS involves an efficiency enhancing cooperative information exchange. In both situations, prohibiting non-members from access is an ancillary restraint that is "essential to the protection of the main purpose" of the organization. 52 F. Supp. at 374. Likewise, there is no anticompetitive "exclusion," as long as membership itself is available on reasonable terms.

As the petition demonstrates, the Fifth Circuit and four federal district courts have each applied *Associated Press* to the Board membership requirement and concluded that the requirement, standing alone, does not violate the federal antitrust laws.[13] In addition, two state supreme courts have each found that the Board membership requirement does not violate state antitrust laws patterned after the Sherman Act.[14] These courts have recognized that, as long as Board membership is reasonably available, a broker's purported "exclusion" from a Board's MLS is entirely "voluntary": All the broker must do to participate is "pay [the Board's] dues." *Pope v. Mississippi Real Estate Commission, et al.*, 872 F.2d 127, 130 (5th Cir. 1989); see also

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[13] *Pope v. Mississippi Real Estate Commission, et al.*, 872 F.2d 127 (5th Cir. 1989); *O'Riordan v. Long Island Board of Realtors, Inc.*, 707 F. Supp. 111 (E.D.N.Y. 1989); *Brown v. Indianapolis Board of Realtors*, 1977-1 Trade Cases ¶ 61,435 (S.D. Ind. 1977); *Martin-Trigona v. National Association of Realtors*, 1978-1 Trade Cases ¶ 61,915 (E.D. Ill. 1978); *Murphy v. Alpha Realty, Inc.*, 1978-2 Trade Cases ¶ 62,388 (N.D. Ill. 1978).

[14] *Pomanowski v. Monmouth County Board of Realtors*, 446 A.2d 83 (N.J.), *cert. denied*, 459 U.S. 908 (1982); *State v. Cedar Rapids Board of Realtors*, 300 N.W.2d 127 (Iowa 1981); *but cf. Marin County Board of Realtors v. Palsson*, 549 P.2d 833 (Cal. 1976).

Pomanowski v. Monmouth County Board of Realtors, 446 A.2d 83, 90 (N.J. 1982).

The decision below directly conflicts with these cases. Likewise, the decision conflicts with holdings of the First Circuit and one district court that the Board membership requirement is not a *per se* unlawful tying arrangement.[15] This Court should grant certiorari to resolve these conflicts and to clarify whether a Board with open membership criteria may lawfully require brokers to join the Board as a condition of participation in its MLS.

2. In analyzing the Board membership requirement, the Eleventh Circuit ignored *Associated Press* and each of the federal and state court decisions upholding that requirement. Instead, the court asked whether the Board membership requirement was "narrowly tailored" to its admittedly procompetitive goals. Because the court of appeals believed that a Board MLS could "easily impose" a set of professional standards directly upon its participants, it declared the Board's MLS participation rules to be unreasonable as a matter of law if the Board's MLS is a valuable competitive asset in a relevant real estate brokerage market. Pet. App. 27a-28a.

As the petition shows at pages 18-19, the Eleventh Circuit's "narrowly tailored" standard conflicts with other circuits' treatment of ancillary restraints. Even more fundamentally, however, this standard fails to consider the significant efficiencies created by the Board membership requirement. For example, the Board membership requirement:

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[15] *Wells Real Estate, Inc. v. Greater Lowell Board of Realtors, et al.*, 850 F.2d 803 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988); *O'Riordan, supra*, 707 F. Supp. 111 (E.D.N.Y. 1989).

(a) prevents "free riding" by brokers who will utilize the Board's MLS, but will not support the Board's professional standards enforcement processes and other ancillary Board services that are funded from Board dues and are necessary to the efficient operation of the Board's MLS;

(b) avoids the potential costs to a Board of maintaining two distinct professional standards enforcement systems: one for enforcing MLS rules and regulations and another for enforcing the Realtors Code of Ethics; and

(c) increases the number of brokers willing to participate in the MLS by providing assurances that all participants have agreed to abide by the Code and that disputes will be adjudicated in a fair and uniform manner.

These efficiencies will be lost or significantly compromised if the lower court's "narrowly tailored" standard becomes the law.

Carried to its logical conclusion, the lower court's inquiry into whether the petitioners' MLS rules could be more "narrowly tailored" will force Boards that operate MLSs to endure constant and protracted antitrust litigation—not over whether the Board's MLS rules are, on balance, procompetitive—but whether it is possible for the Board to "narrow" further its MLS rules to accommodate the plaintiff and still maintain a functioning MLS.

MLSs can be operated under a variety of rules and regulations, often with similar procompetitive effects on a relevant real estate brokerage market. Therefore, a Board subject to the lower court's "narrowly tailored" standard will never be able to defend successfully a policy decision to operate in one procompetitive manner rather than

another. Dissenters will always be able to argue, or even prove, that the MLS could still function effectively under their preferred rules rather than the rules adopted by the directors of the Board or its MLS. Faced with this potential litigation onslaught, Boards may well be forced, at a minimum, to maintain different sets of substantive and procedural requirements for Realtors and non-member MLS participants, with the potential for conflicting adjudications and confusing choice of law and forum issues whenever disputes involve a Realtor and a non-member.

An equally possible outcome is that Boards will simply abandon their MLSs as too costly and burdensome to maintain. This is especially true if large Realtor firms determine that the benefits of participating in an MLS with non-member brokers no longer outweigh the risks, and they withdraw from MLS participation altogether.

3. For over eighty years, Boards of Realtors have required Board membership as a condition of MLS participation. This membership requirement has enabled Boards and NAR to increase the professionalism of real estate brokers, provide MLS access to the largest number of brokers, and, ultimately, expand dramatically the industry's output.

Furthermore, the Justice Department repeatedly targeted Boards for antitrust enforcement during the 1970s. Throughout this litigation, the Department never challenged the Board membership requirement per se. Instead, it simply required Boards to have "reasonable and non-discriminatory written requirements for membership" as this Court held in *Associated Press*.

The understandings reached between the Justice Department and NAR have been the benchmark for antitrust compliance in the real estate brokerage industry. Rely-

ing on these understandings, NAR developed its national Membership Qualification Criteria and Multiple Listing Policy. These policies, in turn, govern the MLS operations of nearly 1,000 of NAR's member Boards.

It would be particularly inequitable if the decision of one court unravels the carefully developed policies of NAR designed to enhance consumer welfare in the real estate brokerage industry throughout the country. The antitrust legality of the Board membership requirement is therefore a matter of critical national importance that this Court should resolve.

CONCLUSION

For the reasons stated above and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 7, 1992

APPENDIX

CODE OF ETHICS OF THE NATIONAL ASSOCIATION OF REALTORS

Where the word Realtor is used in this Code and Preamble, it shall be deemed to include Realtor-Associates.

While the Code of Ethics establishes obligations that may be higher than those mandated by law, in any instance where the Code of Ethics and the law conflict, the obligations of the law must take precedence.

Preamble . . .
Under all is the land. Upon its wise utilization and widely allocated ownership depend the survival and growth of free institutions and of our civilization. Realtors should recognize that the interests of the nation and its citizens require the highest and best use of the land and the widest distribution of land ownership. They require the creation of adequate housing, the building of functioning cities, the development of productive industries and farms, and the preservation of a healthful environment.

Such interests impose obligations beyond those of ordinary commerce. They impose grave social responsibility and a patriotic duty to which Realtors should dedicate themselves, and for which they should be diligent in preparing themselves. Realtors, therefore, are zealous to maintain and improve the standards of their calling and share with their fellow Realtors a common responsibility for its integrity and honor. The term Realtor has come to connote competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct in business relations. No inducement of profit and no instruction from clients ever can justify departure from this ideal.

In the interpretation of this obligation, Realtors can take no safer guide than that which has been handed down through the centuries, embodied in the Golden Rule, "Whatsoever ye would that others should do to you, do ye even to them."

Accepting this standard as their own, Realtors pledge to observe its spirit in all their activities and to conduct their business in accordance with the tenets set forth below.

Articles 1 through 5 are aspirational and establish ideals Realtors should strive to attain.

ARTICLE 1

Realtors should become and remain informed on matters affecting real estate in their community, the state, and nation so that they may be able to contribute responsibly to public thinking on such matters.

ARTICLE 2

In justice to those who place their interests in a real estate professional's care, Realtors should endeavor always to be informed regarding laws, proposed legislation, governmental regulations, public policies, and current market conditions in order to be in a position to advise their clients properly.

ARTICLE 3

Realtors should endeavor to eliminate in their communities any practices which could be damaging to the public or bring discredit to the real estate professional. Realtors should assist the governmental agency charged with regulating the practices of brokers and sales licensees in their states. (Amended 11/87)

ARTICLE 4

To prevent dissension and misunderstanding and to assure better service to the owner, Realtors should urge the exclusive listing of property unless contrary to the best interest of the owner. (Amended 11/87)

ARTICLE 5

In the best interests of society, of their associates, and their own businesses, Realtors should willingly share with

other Realtors the lessons of their experience and study for the benefit of the public, and should be loyal to the Board of Realtors of their community and active in its work.

Articles 6 through 23 establish specific obligations. Failure to observe these requirements subject Realtors to disciplinary action.

ARTICLE 6

Realtors shall seek no unfair advantage over other Realtors and shall conduct their business so as to avoid controversies with other Realtors. (Amended 11/87)

ARTICLE 7

In accepting employment as an agent, Realtors pledge themselves to protect and promote the interests of the client. This obligation of absolute fidelity to the client's interests is primary, but it does not relieve Realtors of the obligation to treat fairly all parties to the transaction.

ARTICLE 8

Realtors shall not accept compensation from more than one party, even if permitted by law, without the full knowledge of all parties to the transaction.

ARTICLE 9

Realtors shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property or the transaction. Realtors shall not, however, be obligated to discover latent defects in the property or to advise on matters outside the scope of their real estate license. (Amended 11/86)

ARTICLE 10

Realtors shall not deny equal professional services to any person for reasons of race, color, religion, sex, handicap, familial status, or national origin. Realtors shall not be

parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, handicap, familial status, or national origin. (Amended 11/89)

ARTICLE 11

Realtors are expected to provide a level of competent service in keeping with the standards of practice in those fields in which the Realtor customarily engages.

Realtors shall not undertake to provide specialized professional services concerning a type of property or service that is outside their field of competence unless they engage the assistance of one who is competent on such types of property or services, or unless the facts are fully disclosed to the client. Any persons engaged to provide such assistance shall be so identified to the client and their contribution to the assignment should be set forth.

Realtors shall refer to the Standards or Practice of the National Association as to the degree of competence that a client has a right to expect the Realtor to possess, taking into consideration the complexity of the problem, the availability of expert assistance, and the opportunities for experience available to the Realtor.

ARTICLE 12

Realtors shall not undertake to provide professional services concerning a property or its value where they have a present or contemplated interest unless such interest is specifically disclosed to all affected parties.

ARTICLE 13

Realtors shall not acquire an interest in or buy or present offers from themselves, any member of their immediate families, their firms or any member thereof, or any entities in which they have any ownership interest, any real property without making their true position known to the owner or the owner's agent. In selling property

they own, or in which they have any interest, Realtors shall reveal their ownership or interest in writing to the purchaser or the purchaser's representative. (Amended 11/90)

ARTICLE 14

In the event of a controversy between Realtors associated with different firms, arising out of their relationship as Realtors, the Realtors shall submit the dispute to arbitration in accordance with the regulations of their Board or Boards rather than litigate the matter.

ARTICLE 15

If charged with unethical practice or asked to present evidence or to cooperate in any other way, in any disciplinary proceeding or investigation, Realtors shall place all pertinent facts before the proper tribunals of the Member Board or affiliated institute, society, or council in which membership is held and shall take not action to disrupt or obstruct such processes. (Amended 11/89)

ARTICLE 16

When acting as agents, Realtors shall not accept any commission, rebate, or profit on expenditures made for their principal, without the principal's knowledge and consent. (Amended 11/91)

ARTICLE 17

Realtors shall not engage in activities that constitute the unauthorized practice of law and shall recommend that legal counsel be obtained when the interest of any party to the transaction requires it.

ARTICLE 18

Realtors shall keep in a special account in an appropriate financial institution, separated from their own funds, monies coming into their possession in trust for other persons, such as escrows, trust funds, clients' monies, and other like items.

ARTICLE 19

Realtors shall be careful at all times to present a true picture in their advertising and representations to the public. Realtors shall also ensure that their status as brokers or Realtors is clearly identifiable in any such advertising. (Amended 11/86)

ARTICLE 20

Realtors for the protection of all parties, shall see that financial obligations and commitments regarding real estate transactions are in writing, expressing the exact agreement of the parties. A copy of each agreement shall be furnished to each party upon their signing such agreement.

ARTICLES 21

Realtors shall not engage in any practice or take any action inconsistent with the agency of other Realtors.

ARTICLE 22

In the sale of property which is exclusively listed with a Realtor, Realtors shall utilize the services of other brokers upon mutually agreed upon terms when it is in the best interests of the client.

Negotiations concerning property which is listed exclusively shall be carried on with the listing broker, not with the owner, except with the consent of the listing broker.

ARTICLE 23

Realtors shall not knowingly or recklessly make false or misleading statements about competitors, their businesses, or their business practices. (Amended 11/91)

The Code of Ethics was adopted in 1913. Amended at the Annual Convention in 1924, 1928, 1950, 1951, 1952, 1955, 1956, 1961, 1962, 1974, 1982, 1986, 1987, 1989, 1990 and 1991.

(4)

No. 91-1108

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Supreme Court of the United States
OCTOBER TERM, 1991

DEKALB BOARD OF REALTORS, INC., and
METROPOLITAN MULTI-LIST, INC.,
Petitioners,

v.

FLETCHER L. THOMPSON and
EMPIRE REAL ESTATE BOARD, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES, THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN DENTAL ASSOCIATION, THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND THE NATIONAL ASSOCIATION OF TRUCK STOP OPERATORS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

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MOTION OF THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES, THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN DENTAL ASSOCIATION, THE NATIONAL ASSOCIATION OF HOME BUILDERS, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND THE NATIONAL ASSOCIATION OF TRUCK STOP OPERATORS, FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

The American Society of Association Executives, the American Medical Association, the American Dental Association, the National Association of Home Builders, the National Association of Social Workers, and the National Association of Truck Stop Operators, respectfully move this Court for permission to file a brief as *amici curiae* in support of the petition in this case.

Pursuant to Supreme Court Rule 37.2, *amici* sought written consent of all parties to the filing of this brief. Petitioners have consented but respondents have not. By letter to counsel for Respondents dated January 31, 1992, counsel for the American Society of Association Executives, on behalf of all *amici* who join in this brief, requested consent from Respondents to the filing of this *amici curiae* brief. On February 3, 1992, counsel for *amici* spoke to David A. Webster, one of the attorneys for the Respondents; Mr. Webster stated that, after consideration of *amici*'s request, the Respondents had decided to deny the request. Accordingly, *amici* must file this motion with the Court.

Amici respectfully submit that there are compelling reasons for the Court to grant this motion. As the statement of interest in the attached proposed brief explains in detail, each organization represented in this brief is the leading national membership organization in its respective professional or business area. *Amici* provide programs and services to hundreds of thousands of individual and business members nationwide. As such, *amici* are vitally concerned about the application of the antitrust laws to associations.

Amici seek leave to file this brief in order to bring to the Court's attention the importance of the decision below to associations generally and to provide the Court with the perspective of national organizations. In this brief, *amici* endorse but do not reprise the arguments offered in the petition for certiorari. *Amici* also do not repeat the information and arguments contained in the *amicus* brief of the National Association of Realtors (NAR), which focuses on the unique importance of the case to the real estate industry. Instead, *amici* set forth three additional reasons, beyond what is discussed in the petition or the NAR brief, for granting the petition.

First, *amici* explain that the decision below is of national importance because its impact is not limited to real

estate boards and multiple listing services. The Eleventh Circuit's decision calls into question the basic issue whether an association with reasonable and fairly applied membership criteria must make its most attractive services available to persons who choose, for whatever reason, not to join. This issue is of enormous practical consequence for associations. If the Eleventh Circuit is correct that associations must make their most valuable services available to non-members, then membership in associations will inevitably decline. To the extent that it does, the ability of associations to serve their members and the public will be diminished.

Second, *amici* bring to the Court's attention the fact that the decision below conflicts with decisions of other federal courts in association cases outside the real estate context. In these decisions, which are not discussed in either the petition or the NAR brief, courts have held that an association's membership criteria are not unlawful when they are not arbitrary or unreasonably exclusionary. See, *e.g.*, *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 188 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *Ralph C. Wilson Indus., Inc.* v. *Chronicle Broadcasting Co.*, 794 F.2d 1359, 1366 (9th Cir. 1986).

Third, *amici* point out that, regardless of whether the Eleventh Circuit reached the correct result, *amici* share a strong interest in obtaining clear guidance from this Court on the application of the Sherman Act to membership requirements. National associations have nationally applicable membership requirements. Accordingly, such associations need a single, national standard with which to conform those requirements. Only this Court can provide the necessary and important guidance.

The brief that *amici* seek to file thus supplements but does not duplicate the petition and the other *amicus* brief before the Court. *Amici* believe that their brief will materially assist the Court in its review of the petition.

Accordingly, *amici* respectfully request that the Court grant their motion for leave to file a brief as *amici curiae* in support of the petition.

Respectfully submitted,

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QUESTION PRESENTED

Whether an association violates Section 1 of the Sherman Act, 15 U.S.C. § 1, by requiring individuals to join the association in order to obtain access to the association's services, where membership is available on reasonable and non-discriminatory terms.

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INTEREST OF *AMICI CURIAE*

The American Society of Association Executives (ASAE) is an association of 20,000 individual executives of national, state, and local associations. The members of ASAE manage leading business, professional, educational, technical, industrial, and trade associations

representing more than 8,000 national, state, and local associations serving more than 80 million people and companies. Since its founding in 1920, ASAE has been dedicated to improving the performance and effectiveness of voluntary membership organizations, enhancing the professionalism of association executives, and encouraging participation by association executives and their organizations in public policy issues.

The American Medical Association (AMA) is a private, voluntary, non-profit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and to improve the public health. Its 290,000 members practice in all fields of medical specialization. The AMA's interest in this matter stems from its longstanding efforts to attract new members by developing programs and services. These include accrediting medical schools and training programs for allied health professionals, developing and enforcing a code of ethics, and providing other programs that serve the membership and the public. In addition, a number of state medical societies offer valuable services, such as malpractice insurance, to their members.

The American Dental Association (ADA) is organized as a not-for-profit corporation under the laws of the State of Illinois. Founded in 1859, the ADA is a voluntary professional association with approximately 140,000 practicing member dentists, representing approximately 75% of this nation's dentists. The purpose of the ADA is to encourage the improvement of the oral health of the public and to promote the art and science of dentistry. The programs and services that the ADA provides its members include an annual scientific meeting on clinical and technical advances in dentistry, seminars on clinical skills and practice management, and materials designed to educate patients about oral health.

The National Association of Home Builders (NAHB) is the voice of the American shelter industry, represent-

ing more than 153,000 builder and associate members around the country. NAHB's members are involved in all aspects of building and supplying single-family homes, apartments, condominiums and commercial and industrial projects, as well as land development and remodeling. NAHB is a federated association with approximately 850 state and local affiliates. NAHB and its affiliates constantly strive to develop quality programs and services for their members.

The National Association of Social Workers (NASW), a non-profit professional association with over 135,000 members throughout the United States and abroad, is the largest association of professional social workers in the world. NASW works to enhance the professional growth and development of its members, to create and maintain professional standards and to advance sound public policies. NASW provides a variety of membership benefits including insurance and credentialing.

The National Association of Truck Stop Operators (NATSO) is the only professional and legislative representative of the truck stop and travel plaza industry in North America. Currently, more than 1,000 truck stops, most of which are owned by individuals or joint ventures rather than major corporations, are members of this association. Nearly 250 companies who sell products and services to the industry and its customers have joined as Allied members. NATSO truck stops pump about two thirds of the national retail total of diesel fuel, collectively constituting annual business exceeding $15 billion. NATSO provides members a system of instant electronic transmission of check-cashing and credit information and sponsors the American Truck Foundation, funding research and services on combatting drug and alcohol abuse and helping to find missing children.

Each of the associations represented herein is thus the leading national membership association in its respective business or professional area. Collectively, *amici* repre-

sent hundreds of thousands of individual and business members nationwide. The decision below is of particular concern to all *amici* because of its potential seriously to affect an association's incentive and ability to develop valuable programs for its members and to attract and keep members. Accordingly, *amici* wish to present their views about the national importance of this case from the perspective of associations.

REASONS FOR GRANTING THE PETITION

The petition for certiorari demonstrates that the decision below conflicts with decisions of two courts of appeals, two state Supreme Courts, and numerous district courts on the question whether a local board of Realtors can require real estate brokers to become members of the board in order to gain access to the board's multilist service. See Pet. 10-24. The petition also demonstrates that these conflicts are of national importance and that the real estate industry needs a single national rule on this question. Pet. 24-26. *Amici* submit that these reasons for granting the petition are compelling.

From the more general perspective of national associations, there are three additional reasons for granting the petition. First, the decision below calls into question the basic issue of whether an association with reasonable and fairly applied membership criteria must make its most attractive services available to persons who choose, for whatever reason, not to join. This issue is of significant practical consequence for associations. If the Eleventh Circuit is correct that associations must make their most valuable services available to non-members, then membership in associations will inevitably decline. To the extent that it does, the ability of associations to serve their members and the public will be diminished.

Second, the decision below conflicts with the approach taken by most federal courts regarding the antitrust significance of an association's membership requirements. These courts generally hold that membership criteria of

associations trigger antitrust concerns "only in that rare instance when such membership limitations have the effect of unreasonably restraining trade. . . ." *Kreuzer* v. *American Academy of Periodontology*, 735 F.2d 1479, 1496 (D.C. Cir. 1984). Contrary to the Eleventh Circuit, federal courts have generally rejected antitrust challenges to membership requirements as long as those requirements were not themselves anticompetitive and were not applied arbitrarily. See, *e.g.*, *E. A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 188 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); *Ralph C. Wilson Indus., Inc.* v. *Chronicle Broadcasting Co.*, 794 F.2d 1359, 1366 (9th Cir. 1986).

Third, regardless of whether the Eleventh Circuit reached the correct result, the conflicts that its decision creates with other decisions should be resolved. National associations have nationally applicable membership requirements. Accordingly, such associations need a single, national standard with which to conform those requirements. Only this Court can provide the necessary and important guidance.

1. The court below held that the Sherman Act prohibits a board of Realtors from requiring licensed brokers to become members of the board in order to gain access to the board's wholly owned multiple listing service if a substantial portion of real estate sales is effectuated through that service. Pet. App. 24a. The general principle that emerges from the decision below is that an association must make a service available to non-members whenever the "service has 'sufficient economic importance that exclusion results in the denial of the opportunity to compete *effectively* on equal terms.'" *Id.* (quoting *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1373 (5th Cir. 1980) (emphasis in the original).[1] If this prin-

[1] In formulating this principle, the Eleventh Circuit apparently ignored the fact that as long as an individual can join an association on reasonable, non-discriminatory terms, that individual is not denied the *opportunity* to compete effectively on equal terms.

ciple is correct, any association that provides a valuable service is potentially committing an antitrust violation by limiting that service to members. In this analysis, lack of access to any number of valuable services that a non-member wants may plausibly constitute a "denial of the opportunity to compete effectively on equal terms."

For example, a medical society may sponsor a malpractice insurance program that offers physicians favorable premiums. A dental society may offer a unique clinical skills enhancement program. A trade association may offer members a group purchasing service that provides members with lower prices than non-members can find, or may sponsor a trade show that offers members unique access to their potential market. In each of these examples, a non-member could allege with some plausibility that his or her exclusion from that service "results in the denial of the opportunity to compete effectively on equal terms." Therefore, an organization that confines any of these services to members runs a serious risk of antitrust liability under the Eleventh Circuit's decision.

There is no reason why the antitrust laws should require associations to make their services available to non-members when membership requirements are reasonable and non-discriminatory. In such circumstances, there is no boycott or exclusion (in any antitrust sense of the term) of non-members from the service in question. Instead, there is only the non-member's decision to reject the service on the terms on which it is offered to all potential members.

Nor should such an arrangement be condemned as an unlawful tie-in. As the First Circuit recognized in *Wells Real Estate, Inc.* v. *Greater Lowell Bd. of Realtors*, 850 F.2d 803 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988), "a trade organization" is not "a 'seller[]' in the usual sense . . . ." *Id.* at 815. It is a membership organization. The members, as represented by an elected board of directors, determine the services, dues, and

obligations that will make membership in the association as widely attractive to potential members as possible. As the court also recognized, an association's services are not separate products for tying analysis, but rather are "advantages gained by joining that trade organization" and ones that, unlike the typically purchased product, carry "certain responsibilities as well." *Id.*[2]

Both the representative structure of a membership organization and the reciprocal nature of services and obligations distinguish the association's offer of membership and services from the seller who imposes a tie-in on an unwilling buyer. Simply put, an association cannot exist without offering services. Yet, under the Eleventh Circuit's analysis any association's decision to offer a valuable service in conjunction with membership is a potential tie-in.

The Eleventh Circuit's rulings on boycott and tying law therefore will undermine the ability and incentive of associations to develop valuable services. Allowing potential members to choose only to avail themselves of selected services erodes the incentive to join the association and undercuts the ability of the association to function as a coherent whole. Furthermore, the Eleventh Circuit's decision reduces the incentive to develop and improve valuable services. The more successful the service, the greater the risk that the association will face an antitrust challenge from a non-member seeking access to those services. In essence, the Eleventh Circuit's ruling undermines the ability of associations to serve their members and the public and discourages competitive innovation.

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[2] *See Boddicker* v. *Arizona State Dental Ass'n*, 680 F.2d 66, 67 (9th Cir.) (membership in local association "cannot be characterized as a product or service distinct from" membership in national association), *cert. denied*, 459 U.S. 837 (1982); Pasahow, *Recent Developments in Tying Law*, 57 Antitrust L.J. 379, 385 (1988) ("no separate markets exist for the interrelated benefits and burdens of association membership").

2. Not surprisingly, the Eleventh Circuit's decision is inconsistent with numerous decisions resolving antitrust challenges to an association's enforcement of its membership rules. As the petition demonstrates (Pet. 12-13), the leading case is *Associated Press* v. *United States*, 326 U.S. 1 (1945). In *Associated Press*, this Court affirmed the decision of a three-judge district court to strike down membership requirements that were arbitrary and were designed to allow members to exclude competitors. Nevertheless, the Court allowed A.P. to continue to prohibit non-members from obtaining A.P. news. *Id.* at 21-23. Once all competitors were free to join A.P. on equal and reasonable terms, A.P.'s decision to make its news available only to members would not violate Section 1. *Id.*; see *Worthen Bank & Trust Co.* v. *National BankAmericard Inc.*, 485 F.2d 119, 128-29 (8th Cir. 1973) (explaining distinction in *Associated Press* between unreasonable membership requirements and rules restricting services to members), *cert. denied*, 415 U.S. 918 (1974).

The distinction drawn in *Associated Press* is foreshadowed in two earlier decisions of this Court. In *Anderson* v. *United States*, 171 U.S. 604 (1898), this Court upheld a bylaw of an association of livestock traders that prevented non-members of the association from trading with members. The Court found no unreasonable restraint of trade, observing that the purpose and effect of the by-law was not to set prices or reduce output but to improve the functioning of the market, and stressing that "[a]ll yard traders have the opportunity of becoming members of the exchange, and to thus obtain all the advantages thereof." *Id.* at 618; see also *id.* at 619.

Six years later, in *Montague & Co.* v. *Lowry*, 193 U.S. 38 (1904), this Court held that an association of manufacturers and dealers who refused to offer non-members the same favorable financial terms as members did violate Section 1. In *Montague*, however, membership in the as-

sociation was *not* open to all but "was a matter for the arbitrary decision of the association," and plaintiffs' application in particular "was subject to arbitrary rejection." *Id.* at 46-47. The basic principle that emerges from *Associated Press*, *Anderson*, and *Montague* is that associations may restrict services to members, but may not impose arbitrary or unreasonable membership requirements.

That principle is reflected in the subsequent decisions of numerous lower courts.[3] For example, in *E. A. McQuade Tours*, 467 F.2d at 188, the Fifth Circuit ordered that judgment be entered for the defendant association where the association's rule that excluded plaintiff from the association's list of approved tour operators served the "reasonable" purpose of encouraging tour operators to participate in the listing service and was not "applied

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[3] Thus, lower courts have invalidated membership requirements that arbitrarily or unfairly excluded competitors from access to important services. *See, e.g., American Fed. of Tobacco Growers* v. *Neal*, 183 F.2d 869, 871 (4th Cir. 1950) (membership rule was "a mere pretext" for excluding a competitor); *Blalock* v. *Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1265 (N.D. Ga. 1973) (expulsion of member was pursuant to "completely unfettered, subjective discretion" and with "the purpose . . . to exclude plaintiff from the market").

At the same time, courts generally have upheld requirements that were reasonable and fairly applied. *See, e.g., Hatley* v. *American Quarter Horse Ass'n*, 552 F.2d 646, 653-54 (5th Cir. 1977) (rule had a "legitimate" purpose and was "not applied in a discriminatory, arbitrary, or capricious fashion"); *Deesen* v. *Professional Golfers' Ass'n*, 358 F.2d 165, 168 (9th Cir.) (membership "open to all persons on the same terms" and rules not applied "in an arbitrary and unreasonable manner"), *cert. denied*, 385 U.S. 846 (1966); *Brenner* v. *World Boxing Council*, 675 F.2d 445, 455 (2d Cir.) (no evidence that "rules are administered in an arbitrary and ad hoc fashion"), *cert. denied*, 459 U.S. 835 (1982); *United States* v. *New Jersey Auto Glass Dealers' Ass'n*, 1960 Trade Cases (CCH) ¶ 69,764, at 76,978 (D.N.J. 1960) (consent decree requiring open membership but allowing expulsion for legitimate reasons such as "failure to pay dues"). *But cf.* cases cited *infra* notes 4 & 5.

to [plaintiff] arbitrarily or discriminatorily." Notably, the rationale for the rule at issue in *E. A. McQuade* is virtually identical to the rationale for the membership requirement in this case: Both served to encourage participation in a listing service by providing "assurance that other [participants] were themselves responsible." *Id.*; see Pet. 4-5 (quoting Pet. App. 27a).

The facts of this case also are comparable to those in *Ralph C. Wilson Indus., Inc.* v. *Chronicle Broadcasting Co.*, 794 F.2d 1359, 1366 (9th Cir. 1986). There, as here, despite the allegation of a "boycott," the defendant association did not exclude anyone: The only obstacle to plaintiff's obtaining the association's services was plaintiff's unwillingness to join the association at the prevailing "membership rates, [which were] predetermined at an equal rate for all stations within the same market." *Id.* The court therefore ordered judgment for the association. *Id.* Had the Eleventh Circuit employed the Ninth Circuit's analysis in *Wilson* or the Fifth Circuit's in *McQuade*, it would have affirmed the judgment of the district court dismissing plaintiffs' complaint.

The Eleventh Circuit's decision with respect to respondents' tying claim also is inconsistent with prevailing authority. As demonstrated in the petition, the Eleventh Circuit's decision creates the prospect of *per se* liability whenever an association offers a valuable service and has engendered good will—a result that is inconsistent with the conclusion in *Associated Press* and other cases that such arrangements do not violate Section 1. See Pet. 21-24. And as discussed *supra*, p. 7 & n.2, the court also erred in treating association membership as a product separate from the services the association provides for purposes of tying analysis. The Eleventh Circuit's mechanical application of the separate products test in *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 21-22 (1984), without regard to functional or efficiency concerns, has produced an untenable result. See

Jack Walters & Sons Corp. v. *Morton Bldg., Inc.*, 737 F.2d 698, 703-04 (7th Cir.) (explaining how separate products test, applied mechanically, leads to absurd results "that a sugary cereal was a tie-in (sugar tied to cereal)" or that "belts are tie-ins of buckles to straps"), *cert. denied*, 469 U.S. 1018 (1984).

The Eleventh Circuit decision thus conflicts with other association cases and with sound antitrust principles. It also compounds the confusion created by other cases in which the Sherman Act has been applied to associations in a manner apparently inconsistent with *Associated Press*. Associations sponsoring trade shows, for example, have been required to allow non-members to participate in those events.[4] And one court of appeals has reversed a finding of summary judgment for the defendant association even though there appeared to be no evidence that membership rules were unreasonable or discriminatory.[5] By compounding the uncertainty that these decisions have created over the application of the Sherman Act to an association's membership requirements, the Eleventh Circuit's decision underscores the need for a definitive ruling from this Court.

3. Quite apart from whether the decision below is correct, the more than 20,000 national associations in this country need a clear statement as to the applicability of the Sherman Act to their membership rules. The interlocutory posture of this case therefore is no reason to deny the petition. The holding of the Eleventh Circuit

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[4] *See United States* v. *Western Winter Sports Representatives Ass'n*, 1962 Trade Cases (CCH) ¶ 70,418, at ¶ 76,683 (N.D. Cal. 1962) (consent decree prohibits association from limiting participation in trade show to association members); *National Ass'n of Women's & Children's Apparel Salesmen, Inc.* v. *FTC*, 479 F.2d 139, 142-43 n.7 (5th Cir.) (FTC cease-and-desist order, not challenged on merits, prohibits limiting trade show to members), *cert. denied*, 414 U.S. 1004 (1973).

[5] *See McDonnell* v. *Michigan Chapter No. 10*, 587 F.2d 7, 8-9 (6th Cir. 1978).

demands the immediate attention of every national association.

National associations must adopt national rules regarding such basic issues as membership requirements. These associations therefore face the difficult questions whether and how to revise national policies to ensure compliance in all jurisdictions, including the Eleventh Circuit. As a result of the potential liability created by the decision below, they face these questions now. Because national associations need a uniform rule in this important and recurring area of antitrust law, this Court should grant the petition and clarify their responsibilities to non-members.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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